NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Inc
Washington, D.C.

S. HRG. 101-702

CABLE TV CONSUMER PROTECTION ACT OF 1989

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1880

TO AMEND TITLE VI OF THE COMMUNICATIONS ACT OF 1934 TO ENSURE CARRIAGE ON CABLE TELEVISION OF LOCAL NEWS AND OTHER PROGRAMMING AND TO RESTORE THE RIGHT OF LOCAL REGULATORY AUTHORITIES TO REGULATE CABLE TELEVISION RATES, AND FOR OTHER PURPOSES

MARCH 29, AND APRIL 4, 1990

Printed for the use of the Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
30-308 O WASHINGTON : 1990

S261-57

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ERNEST F. HOLLINGS, South Carolina, *Chairman*

DANIEL K. INOUYE, Hawaii
WENDELL H. FORD, Kentucky
J. JAMES EXON, Nebraska
ALBERT GORE, JR., Tennessee
JOHN D. ROCKEFELLER IV, West Virginia
LLOYD BENTSEN, Texas
JOHN F. KERRY, Massachusetts
JOHN B. BREAUX, Louisiana
RICHARD H. BRYAN, Nevada
CHARLES S. ROBB, Virginia

JOHN C. DANFORTH, Missouri
BOB PACKWOOD, Oregon
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
ROBERT W. KASTEN, JR., Wisconsin
JOHN McCAIN, Arizona
CONRAD BURNS, Montana
SLADE GORTON, Washington
TRENT LOTT, Mississippi

KEVIN G. CURTIN, *Chief Counsel and Staff Director*
WALTER B. McCORMICK, JR., *Minority Chief Counsel and Staff Director*

SUBCOMMITTEE ON COMMUNICATIONS

DANIEL K. INOUYE, Hawaii, *Chairman*

ERNEST F. HOLLINGS, South Carolina
WENDELL H. FORD, Kentucky
ALBERT GORE, JR., Tennessee
J. JAMES EXON, Nebraska
JOHN F. KERRY, Massachusetts
LLOYD BENTSEN, Texas
JOHN B. BREAUX, Louisiana

BOB PACKWOOD, Oregon
LARRY PRESSLER, South Dakota
TED STEVENS, Alaska
JOHN McCAIN, Arizona
CONRAD BURNS, Montana
SLADE GORTON, Washington

CONTENTS

Page

Opening statements:
- Senator Inouye 1
- Senator Danforth 2
- The Chairman 3
- Senator Gore 4
- Senator Ford 5
- Senator Packwood 6
- Senator Pressler 8
- Senator Breaux 8
- Senator McCain 9
- Senator Burns 10
- Senator Kerry 12
- Senator Stevens 13

Text of S. 1880 14

CHRONOLOGICAL LIST OF WITNESSES

MARCH 29, 1990

Anstrom, Decker, executive vice president, National Cable Television Assn 304

Burchill, Thomas, president and CEO, Hearst/ABC-Viacom Entertainment Services 132

Fritts, Edward O., president, National Association of Broadcasters 162
- Prepared statement 164

Garner, B. Allen, on behalf of the Jefferson City mayor and city council 240
- Prepared statement 242

Geller, Henry, Markel Foundation 252
- Prepared statement 254
- Questions of Senator Gorton and the answers 270

Hedlund, James, president, Association of Independent Television Stations, Inc 184
- Prepared statement 186

Hipple, Joseph W. III, chief operating officer, People's Choice TV 272
- Prepared statement 274

Hostetter, Amos, Jr., chairman and CEO, Continental Cablevision, Inc 118
- Prepared statement 120

Mooney, James P., president and CEO, National Cable Television Assn 45
- Prepared statement 47

Vetter, Cyril, president, WLVA TV; accompanied by Jay Kriegel, senior vice president, CBS 293
- Prepared statement 295

APRIL 4, 1990

Opening statements:
- Senator Inouye 311
- Senator Exon 312
- Senator Burns 370

Collins, A. Gray, Jr., executive vice president, external affairs, Bell Atlantic 318
- Prepared statement 320
- Questions of Senator Kerry and the answers 328

Cushing, Harry, president, Telesat Cablevision, Inc., and president, Competitive Cable Assn 405
- Prepared statement 409

Foster, Kent B., president, GTE telephone operations, GTE Corp 331
- Questions of Senator Kerry and the answers 333

Page
Garner, Daniel H., president, Advanced Communications Corp 422
  Prepared statement 424
Gillett, Thomas F., president, Cable Television Laboratories, Inc 341
  Questions of Senator Kerry and the answers 344
Hunt, Richard, on behalf of U.S. Telephone Assn 313
  Letter of April 26, 1990 316
Kompas, John, Kompas-Biel & Associates 419
McLaughlin, John F., executive director, program on information resources policy, Harvard University 355
  Prepared statement 358
Swander, Robert, president, Maxtel Cablevision 432
  Prepared statement 435
Verveer, Philip L., National Cable Television Assn 347
  Prepared statement 349

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Alm, Robert A., director, Hawaii State Department of Commerce and Consumer Affairs, statement 491
Berra, Paul G., president, National Association of Telecommunications Officers and Advisors, statement 516
Channel America LPTV Holdings, Inc., statement 545
Cockrell, Lila, mayor, San Antonio, TX, statement 453
  Questions of Senator Inouye and the answers 483
Davatzes, Nickolas, president & CEO, Arts & Entertainment Cable Network, letter 574
Kimmelman, Gene, Consumer Federation of America, Linda Lipsen, Consumers Union, and Pamela Gilbert, Public Citizen's Congress Watch, letter 578
Kolpin, Ruth L., president, Southwest Missouri Cable TV Inc., letter 572
Kramer, Sidney, county executive, Montgomery County Government, letters of:
  April 10, 1990 590
  May 3, 1990 593
Mooney, James P., president and CEO, National Cable Television Assn., letter 591
National Association of Counties, statement 532
Pandzik, Michael L., president, National Cable Television Cooperative, Inc., letter 576
Palmater, Iona, founder, Florida Alliance for Competitive Televison Services and national coordinator, Cable Subscriber Bill of Rights Groups, statement 496
Public Service Commission, Washington, DC, statement 557
Roberts, Michael, Roberts Broadcasting Co., statement 560
Swanson, Dean, chairman of the board, U.S. Telephone Assn., statement 533
Thomson, Robert, vice president, government affairs, Tele-Communications, Inc., letter 587

CABLE TV CONSUMER PROTECTION ACT OF 1989

THURSDAY, MARCH 29, 1990

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Communications,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:00 p.m., in room SR-253, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Tom Cohen and Toni Cook, staff counsels; and Gina Keeney and William Heyer, minority staff counsels.

OPENING STATEMENT BY SENATOR INOUYE

Senator Inouye. During the first session of the 101st Congress, this subcommittee made an exhaustive study of the state of the cable television industry. It was clear from that study that most members believed that rules established by the Cable Telecommunications Act of 1984 were not adequate in light of the current and potential market position of the cable industry.

As evidence of that concern, one need only examine the many bills introduced to amend the 1984 Act, including significant measures by the ranking member, Senator Danforth and by senior members of the subcommittee, Senators Gore and Pressler.

At the direction of the Chairman of the committee, Senator Hollings, Senator Danforth and myself and the committee staff were directed to draft a substitute for the Danforth legislation.

Needless to say, as all of you have noted, this was not an easy task. While most members agreed that legislation was needed, there was no consensus on what remedies should be employed.

After several months of discussion and debate, the staff came forward with a draft, and it is a genuine compromise. If Senators Hollings, Danforth and I were drafting our own bill, we each would have written a much different bill. But that approach goes against the basic nature of this committee and its members.

Further we know that if we were to be successful, especially in the second session of this Congress, a team effort was required. So I wish to thank my Chairman and ranking members, as well as other members of the subcommittee, particularly Senators Gore and McCain for their assistance in reaching this stage in the debate.

It demonstrates the goodwill that exists here as well as the desire not just to debate but to enact legislation.

I know that the staff draft has engendered much discussion and controversy, and this is to be expected. I believe, however, it represents a solid foundation upon which to rest our legislative efforts.

The staff draft is written very much like the 1934 Communications Act. It rightly recognizes the dynamic nature of the communications marketplace and places authority and responsibility with the FCC.

While I have heard concerns about the uncertainty raised by giving the Commission so much discretion, I believe that the issues involved in this debate lend themselves to such an approach.

In addition, this approach will ensure that we will pass some legislation, which I hope will endure. Once we enact this bill our role will then be to ensure the Commission properly exercises this authority.

The purpose of today's hearing and the one scheduled for next Wednesday is to evaluate this staff draft. We all recognize that changes will be required, and we intend to work with all interested parties to try to craft a consensus document.

At the same time, we will not allow this bill, this consensus document, to languish. We hope the legislation can be brought before the committee for a vote within the next month.

Today's hearing will consist of four panels. The first will represent the cable industry. The next two panels will represent the views of broadcasters, consumers, cities and competitors to cable. And the final panel will involve a discussion of the "if carry, must pay proposal" recently announced by the broadcast community.

Before calling upon the witnesses, I am pleased to call upon the author of S.1880, Senator Danforth.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much. I want to pay to you my compliments for the characteristically consummate job you have done in putting together this legislation.

It is obviously a major subject. It is a subject that touches on competing components of a very fundamental sector in our economy.

Clearly, the points raised in the legislation are ones that are controversial in the minds of a lot of people. And yet you and Senator Hollings and the staff in putting this legislation together have truly sought to reach a compromise and to formulate a consensus and to factor into the compromise legislation the various concerns that we have heard ever since last November when the initial version of S. 1880 was introduced.

I think that you have done a really excellent job in formulating a consensus within the Committee and putting together compromise legislation.

I am very pleased to hear your comment that you hope that we can move ahead with dispatch and perhaps we can have a mark-up within the next month. I think that this is a matter in which everyone's interest is served by getting on with it and creating some degree of certainty as to what Congress has in mind.

This legislation has been called the most important consumer legislation in Congress. I think that is correct.

Television is something that means so much to the American people. One of the fundamental economic principles we have tried to follow as a country is that unregulated monopolies are just wrong. I think that that is an unintended result of the law that is now on the books, and I think this is a law that really cries out for change.

So I do thank you very much for this hearing and for the tremendous effort that you and Senator Hollings and the staff have put into this. I think we are really ready to go forward with this legislation, and I hope we can get a similar response in the House of Representatives.

Senator INOUYE. I thank you very much for your kind words. It is now my privilege and pleasure to recognize the Chairman of this committee, Senator Hollings.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. Thank you very much, Mr. Chairman.

The thanks really go to you, Senator Gore and Senator Danforth. Senator Danforth, you said you hope we could move with dispatch. To bring it right into sharp focus, there is no question in my mind if I took a cable TV bill on the floor of the Senate this afternoon, I could pass it by dark.

We have had bills backing up for some years from the distinguished Senator from Tennessee. To yourself and all the others, and Senator Inouye and myself, working with you, observing the gathering storm, I wanted to make one point, and that was that cable television has been a magnificent success since deregulation.

And they say there are two kinds of politicians: Those that tote and carry, and then cockroach politicians, those that fall in and mess up.

And we did not want to fall in and mess it up, trying our very level best to correct the abuses or incompetence of delivery of cable TV service, and its rates. Those are the two big problems. There has arisen from the hearings, the five hearings we had last year, some indication of monopolistic practices, so let us say three. Rates, service and monopolistic practices should, and I am convinced, will be corrected in this measure that we have.

As we set about doing that, we do not want to try to really come in and stultify in any fashion the dynamic development of cable television that is not only now coming in from cable but obviously from satellite delivery of programing.

The competition in other words is everywhere. It is healthy. Programming has been as varied and as versatile as one can possibly imagine. And it is with that feeling that, yes, we are going to have to do something with respect to those rates, services and monopolistic practices, but in a very cautious and deliberate fashion. Working hand in glove with our newly installed Federal Communications Commission, which I feel that now we can work with and let them administer it and move on from there.

So my thanks go out really to all of you folks who are co-sponsoring the bill and particularly our Chairman, Senator Inouye, who has had to listen to everybody all last year and all this year. Thank you a lot, Mr. Chairman.

Senator INOUYE. I thank you, sir.

I would like to now recognize a member of this Committee who has worked long and patiently in the vineyards and has made many contributions, Senator Gore.

OPENING STATEMENT BY SENATOR GORE

Senator GORE. Thank you very much, Mr. Chairman, and I want to echo the comments of others about your leadership in bringing us to this point. It is always a pleasure to work with you and I have been reminded during this fight, that once again, what an outstanding job you do leading our Subcommittee. And to Senator Hollings for making this progress possible my thanks. And to Senator Danforth, our ranking Republican member, who is a co-sponsor of legislation and an originator of legislation on this subject.

We are really looking at several problems. Senator Hollings stated the problems very succinctly and clearly on the cable television question. We are looking also of course at the satellite dish and wireless cable customer issues which come under the heading that Senator Hollings labeled monopolistic practices.

We have made extraordinary progress over the past year. Last spring when Senator Gorton and I and two others—and Senator Ford, of course, who has joined me for quite some time on this; we have been partners on this issue for a while now—introduced our legislation there were many who said with absolute certainty that the Senate would not legislate in the cable area in this Congress.

But because of the diligence with which the committee has pursued the hearing process, we really made progress, and last fall, of course, Senator Danforth introduced legislation which I enthusiastically co-sponsored and the odds immediately began to look better or worse depending on which side of the table you were on.

And now thanks, Senator Inouye, to your leadership, we have a staff draft which whatever else anybody thinks about it has at least settled the issue of whether or not the Committee is going to act this year. I agree with Senator Hollings' assessment of that. The Senate as a whole will act this year in my opinion as he said.

So to all those who have tried just to talk this issue away, and to those who have made claims that all is well in the industry, we can report that the train is moving. We now have six Senate bills addressing these problems.

I have introduced two of them: The Cable Competition Act and the Satellite Television Fair Marketing Act with some 20 senators as co-sponsors. And the point of all of the bills is to give cable customers and satellite dish owners modest relief from skyrocketing rates and the anti-competitive practices within the cable programming industry.

Of course, the staff draft, which is now circulating, by common consensus needs a lot of work. I want to especially thank the Chairman, Senator Inouye, for his ongoing cooperation and that of his staff on matters related to the distribution of satellite television services, and I look forward to working with you to produce final language which will be offered during the mark-up which will address a wide range of problems we have uncovered in this segment of the industry.

And there are other issues which will need careful attention and particularly the prospect of allowing the telephone companies to compete with cable to the advantage of local customers.

Unfortunately, our hearings last fall, because of time constraints which were understandable to all, nevertheless relegated the discussion of telephone company entry to the last moments of the last panel.

I am pleased to learn that we will be devoting attention to this issue during the hearing next week. The evidence already before this committee however already makes a compelling case for legislation in this Congress.

I will elaborate for the record, others have already stated the basic facts on anti-competitive behavior: rates, service, and now the announcement that two of the first major entrants into a major DBS market will be either owned outright by cable or to put it mildly, quite cable-friendly, further diminishing the potential for real competition for the local monopoly.

So, Mr. Chairman, it is time to act. This Committee and this Congress have nothing to gain in cable bashing. None of us wants to make enemies of those who have built a successful industry, an exciting technology, a service with a very legitimate and strong role to play in this country.

I believe it is now in the best interests of the cable industry to pass meaningful legislation, protecting consumers, so cable can get on with doing what it in all fairness can do quite well: offer a variety and growth of entertainment, information and educational programming for the entire family.

I believe that these witnesses and these hearings will build a record that argues undeniably for legislative action as soon as possible in this Congress.

And again, Mr. Chairman, my heartfelt thanks to you for your leadership.

Senator INOUYE. Thank you very much.

Because of the extraordinary interest shown in this hearing, I will recognize all members who wish to express their thoughts before we take in testimony.

Senator Ford.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Let me also add my compliments to you for bringing us to this point today and calling this hearing. I would like to say that you and your staff have been more than cooperative and I think you and you alone could have brought us to the point of agreement to produce what we have that we call a staff draft.

Your efforts, along with Senator Hollings and Danforth have produced a document in my opinion that is remarkable in the number of issues that it has covered. I know it is difficult to reach agreement on any issue involving cable television, so I would like to commend all of you for devoting so much time to this issue.

During the March recess, Mr. Chairman, I made no speeches, which I like very much. I get in the car and travel my state. I may be in the courthouse in the morning, country store at noon for cheese and crackers and RC Cola and drive around the country.

You would be surprised what you learn. Let me just say this, cable rates was one of the major issues raised in all of my visits. Very few communities in Kentucky are paying less than $20 per month for basic cable service. Several large systems raised their rates nearly $5 per month just this month.

Citizens, in my opinion, are outraged and are demanding that we here in Congress do something about it. There is no doubt in my mind that the cable industry has abused the freedom we gave them in 1984.

I do not think the question before this Committee is whether or not to consider cable legislation, but rather what will the cable bill be. I have reviewed the staff draft, which incorporated many of the proposals set forth in Senator Danforth's bill, S. 1880 of which I am co-sponsor.

Although I support the general thrust of the draft, I feel that it fails to go far enough in promoting effective competition as the primary solution. I believe that competition is preferable to reregulation and would be more effective.

I support the efforts to allow telephone companies to compete directly with cable companies. In allowing for this competition, the Congress would go a long way in guaranteeing reasonable rates and good service. Let the telecos and the cable systems fight it out for cable customers.

You would see immediate improvement in my opinion in rates and in service. The staff draft does recognize that telecos have a place in the cable industry, but I believe that Section 10 creates new problems without allowing teleco entry.

Making the telecos merely common carriers of video programming does not solve the problems of the cable industry. It does not promote effective competition in the cable industry, and this is the goal I think we must strive for in adopting legislation on cable.

I understand an amendment will be offered to permit the telecos to compete directly with cable, with appropriate limitations and safeguards to prevent abuses we see in cable today.

So, Mr. Chairman, I hope our solution, when the Committee marks up cable legislation will be competition and not just reregulation.

I thank the Chairman.

Senator INOUYE. It is now my privilege to call upon the senior member of this subcommittee, Senator Packwood.

OPENING STATEMENT BY SENATOR PACKWOOD

Senator PACKWOOD. Mr. Chairman, thank you. I guess we are all shaped by experience. Senator Ford indicated he had great outcry. Mine in Oregon has been different from some reason.

I checked with my staff just before this meeting as to how many letters we have had over the past year on this subject. Up until a few days ago it was less than 25 and then we got about 25 letters all at once on the telephone company entry—clearly instigated.

So if you mean, is this a big issue, at every speech does somebody complain about service, or I could not get hooked up or the rates are too high, at least in Oregon, the answer appears to be no.

Now with that background, let us consider where we were when we passed the Cable Act and what we were trying to achieve because sometimes I think we underestimate our own successes.

In the early 1980s cable really was an infant industry. It was merely retransmitting signals. It had potential, but the potential was being stifled by regulation and especially at the local level with every hamlet and farm and village issuing their own franchises, and I do not need to recall to people's attention here what went on in some of the political campaigns at the time in the efforts to elect or defeat people in accordance with what franchises they might be willing to give.

In any event, Congress thought there was a great potential in cable and we needed a national cable policy, so we passed the Cable Act in 1984. We wanted cable to be unrestrained by unnecessary regulation.

We wanted them to increase their investment in plant and equipment. We wanted to increase their investment in programming. Now what has happened since we passed the act? Subscribers have gone from 30 million to over 50 million.

Cable systems now offer between 33 and 53 channels instead of the 24 or less only five or six years ago; 44 new cable program services have been started and the total number of cable networks is going to reach 110 by the end of 1990.

The investment in plant and equipment has gone from $100 million in 1983 to $500 million in 1989. As far as the investment in programming is concerned, the cable operators' investment in programming has jumped from $234 million in 1983 to over $1 billion in 1989, and the spending by the cable network, premium networks, the HBOs, has doubled from about $1 billion to $2 billion.

Now, have we been successful in achieving what we hoped to achieve? I think so. And I do not think we need to look back with doubts and say, should we have done it and should we go back to re-regulation. I hope we do not go back to that.

Are there problems? Sure. Have you had excessive rate increases in some areas? Yes, although I am not sure we should generalize from specifics and pass national regulation and national potential rate regulation because of isolated circumstances.

Have there been service problems? Some. Are there anti-trust concerns, vertical and horizontal? Sure. And so I am not wedded to keeping the Cable Act as we passed in 1984. But I think we ought to weigh the successes with the problems that do exist and do as little tampering as possible with those areas where what we wanted to achieve has been achieved. If we were to act unwisely or on occasion just negligently, not maliciously, just negligently, we could do damage to the extraordinary success we have had in the expansion of cable over the past six years.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Mr. Chairman, thank you very much. I want to make just a couple of observations because I think this is one of the most important hearings we will hold in terms of consumers and what they are concerned about in terms of cable television.

As you know, I am one of the original co-sponsors of the Cable Television Consumer Protection Act of 1980. Of course, we are not just considering S. 1880 at this hearing, but also the now famous "staff draft."

It sometimes seems that the further we get in the process of cable television legislation, the more issues enter the picture. This sometimes makes me wonder if we will ever accomplish anything, and that of course, is the goal of some interested parties.

Many of the newer issues are important however and should not be lightly shunted aside. This does not mean I favor any of these proposals or oppose them, but they are important and deserve to be addressed.

I am speaking of issues like cable payment for the carriage of network signals. The marketplace has changed greatly in the last 20 years, and this idea deserves serious consideration.

Another major issue that was not addressed in S. 1880 is telephone company entry into cable television. The staff draft allows telephone companies to provide video services as a common carrier only, prohibiting them from providing the programming itself.

At the same, Mr. Chairman, I recognize the validity of the telephone industry argument that the biggest single boost we could give to competition in the cable industry would be to allow the telephone companies into the program package delivery business.

If we decide to take that step it would be a shock to the system and would require extensive safeguards to prevent the telephone companies from simply replacing existing cable companies with a bigger monopoly.

I believe that fiber optic cable technology will ultimately lead us in that direction, but it needs careful direction, and we may or may not be ready for that step at this time. I hope today's hearing will help shed light on this issue.

The staff draft also goes beyond S. 1880 in barring all cable programmers from unreasonable discrimination in programming distribution. S. 1880 applied this provision only to those programmers who are vertically integrated, where I feel the main problem lies.

ESPN for instance which is not vertically integrated, has been very good about providing programming for the alternative technology of wireless cable in South Dakota, although we have had to nudge them a bit on one or two occasions.

I look forward to the testimony of today's witnesses and hope that they can shed some light on some of these issues. Thank you, Mr. Chairman.

Senator **Inouye**. Thank you.

Senator Breaux.

OPENING STATEMENT BY SENATOR BREAUX

Senator **Breaux**. Thank you, Mr. Chairman. I will be very brief. I agree with everyone, that these hearings are particularly, in fact, they are so important I wonder if we just could continue the hearings during the next vote on the Senator floor, maybe we should not interrupt these hearings to go vote.

I think everybody has made some very good points. I will not repeat them. I think that obviously the hearing addresses much more than just a question of regulation of rates. They really address the entire methodology and how we deliver communication services to the people to the people of this country. I want to listen and hopefully learn and hopefully see a representative bill reported out of this committee, I think it is time to do something, and I am not sure of the final product or what it should look like it, but hopefully, the hearings will produce that.

Thank you.

Senator INOUYE. Thank you.

Senator McCain.

OPENING STATEMENT BY SENATOR McCAIN

Senator MCCAIN. Thank you, Mr. Chairman and thank you for holding this hearing. I think it is important to your testimony on S. 1880 that Senator Danforth and I and others introduced, and also the proposal drafted by the Commerce Committee staff.

I did not endorse the staff draft, Mr. Chairman, preferring to reserve judgment until these hearings were held, but I certainly endorse the process, and putting the staff draft out for comment was a sound idea.

The issues are clearly complicated and interrelated, and reasonable people can differ on what the appropriate solutions are.

One recurring theme that I hear from those who are opposed to any legislation, Mr. Chairman, is that any action we take will cripple the industry, eliminate incentive for investment or improvement.

And in response, I would say that in co-sponsoring legislation, that I am in no way interested in harming the cable industry. In fact, I am interested in helping the cable industry to provide a tremendous service to millions of Americans.

There has been an enormous explosion in cable in the last 10 years and we want to see that continue. At the same time, I believe clearly there is a need to instill more competition in the industry and eliminate some of the abuses that have been taking place and I also, like the Senator from Kentucky, continue to hear from many of my constituents.

Competition will give the operators the right incentive. We need to encourage cities to allow competing cable companies. The city of Mace, Arizona for example has told me they are very pleased with the results of their decision to allow another cable company to compete toe to toe with the existing one.

We need to encourage other technologies that would provide competition, and Mr. Chairman, I appreciate how difficult these issues are and we need to address them carefully and fairly.

There seems to be a consensus now even from the cable industry that some action is required. I would suggest that the time is certainly appropriate for us to move forward with some important and meaningful legislation.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Burns.

OPENING STATEMENT BY SENATOR BURNS

Senator BURNS. Thank you, Mr. Chairman, and I want to thank you and the ranking member, Senator Danforth, for your leadership in holding these hearings.

Mr. Chairman, I think our purpose here today is not to necessarily bash or beat up on anybody, especially the cable industry, although there are some of those around that would like to do that.

I know that deregulation of the cable industry has performed a great service in Montana, and in fact, they have brought many things out there that we would not have gotten had it not been for the investments and programming and some farsightedness on the cable industry to deliver those programs to the remote part of this country.

But if we are not careful in these hearings, and I want to get on with these hearings because I am here to listen more than anything else, we do not want to miss some opportunities. The opportunities may be in the rebuilding or to add to the infrastructure of the total telecommunications industry in our country.

It is just as critical from the Lincoln Center in New York to Lincoln, Nebraska to Lincoln County, Montana, that we look at the infrastructure and how each one of them interfaces with the other and the total picture of where we are going in the communications business.

What we have got to look at is competition. Competition is what drives for perfection, to those including to my surprise, in the cable industry it looks like that they would accept a little more regulation in order to maybe stave off some competition.

It has been my experience that regulation can actually harm consumers by slowing innovation and stifling new services. On the other hand, nothing is more pro-consumer than competition, especially competition where there is a level playing field.

Regulation does a very poor job of guaranteeing market choices for consumers. Most ironically, under price regulatory regime, prices are unlikely to fall when they are effectively propped up by regulation.

But if we see new competitors come into the business, we see costs come down, new technologies and new services can be extended into unserved areas.

Mr. Chairman, we are not entirely talking about video entertainment that most of us would relate to cable television. I want my constituents to benefit from this revolution that is going on in the communications industry, and to look at—and I do not support the staff draft as it is written right now, and so I want to hear from other people their attitude and opinion of it.

I want my constituents to be able to rely on good old American know-how and good old American competition to drive those new technologies into the remote areas of this country.

Yes, we must look at all phases of it, and I will be interested in seeing and hearing from our witnesses here today.

I would go ahead and enter my statement into the record, because I came to hear those folks, and if we do not get through this, we will not get anything done.

Thank you very much, Mr. Chairman.

[The statement follows:]

OPENING STATEMENT BY SENATOR BURNS

I would like to begin my remarks by expressing my gratitude to you, Mr. Chairman, as well as Senator Danforth, for your leadership in holding these hearings.

Mr. Chairman, my purpose here today is not to bash and beat up on the cable industry. In fact, I am here to remind my colleagues of the substantial benefits brought about by deregulation of the cable industry. The cable industry has made substantial investments in programming, plant and equipment—investments that have directly benefitted consumers—in particular my constituents in Montana.

If all we heed and hear at these hearings are the problems of cable, then I am afraid that we will have lost an important opportunity. These two days of hearings provide us with a chance to look into the future and to shape it; for we do shape the future of this nation when we shape its telecommunications infrastructure. It is an infrastructure that is critical to the whole nation—from the Lincoln Center in New York, to Lincoln, Nebraska to Lincoln County, Montana.

In describing my hopes for these hearings, it should come as no surprise to my colleagues that all I am saying is: give competition a chance. To those—including, to my surprise, some in the cable industry—who suggest that all we need is re-regulation, I repectfully, but strongly, disagree.

It has been my experience that regulation can actually harm consumers by slowing innovation and stifling new services. On the other hand, nothing is more pro-consumer than competition—most especially, competition where there is a level playing field.

And on no playing field can the benefits of competition be seen more clearly than on the field of communications. Mr. Chairman, history teaches us that you can not regulate technological advancements.

Regulation does a very poor job of guaranteeing a market choice for consumers. Most ironically, under a price regulatory regime, prices are unlikely to fall when they are effectively "propped up" by regulation. On the other hand, we have all seen many instances where competitive market forces spur competitors to innovate in order to reduce costs and improve efficiency. And as costs come down, new technologies and new services can be extended to unserved areas.

Those are the types of truly competitive market forces that I want to introduce, and the people of Montana need, to ensure that our state is fully served.

Mr. Chairman, we are not merely talking about video entertainment in these hearings, we are talking about the communications revolution, and just like each of my colleagues, I want my constituents to benefit from that revolution and not be left behind by it. Moreover, I want our nation to lead that revolution much as we have led the revolutions for democracy over recent months.

Thus, Mr. Chairman, I don't want the guarantee of participation in the electronic information age for the people of Montana to rest solely on heavy-handed regulation as proposed in the "Staff Draft." I want my constituents to be able to rely on good old American know-how as stimulated by good old American competition.

Having identified competiton as the preferred solution, where do I expect this competition to come from? I believe that it will result from this Committee's feelings of technology to meet the needs of our economy and our society.

I believe that the responsibility of this Committee is to free every technology available, and thereby promote competition. I believe that this competition will arise if technologies such as DBS, Wireless Cable, the Home Satellite Dish (HSD) market, and those technologies yet to be discovered, are able to compete and given the same incubation period that was given to cable in its infancy. But I think it would be unwise for us to rest all our hopes for competition on industries and technologies which are not proven and may not ever develop as we predict today.

As a result, I believe that we have to permit telephone companies to compete. However,—and I want to be make myself very clear on this point—I am not endorsing unrestricted telco entry. Rather, I am promoting telco entry with safeguards and restrictions. It is my sincere hope and desire that we find a middle ground—a compromise position—on the telco entry question. A position between the status quo, on the one extreme, and Senator Gore's approach in S. 1068, on the other.

I am confident that we can fashion a strict regulatory framework, with the help of the Administration and the FCC, which will permit telcos to enter the video business, while at the same time protecting the legitimate concerns of the cable industry, broadcasters, programmers, and, most importantly, consumers.

It will be this competition that will help ensure that a modern telecommunications infrastructure and innovative services are available to all Americans—and, most importantly, all Montanans.

Senator INOUYE. Thank you.

Senator Kerry.

OPENING STATEMENT BY SENATOR KERRY

Senator KERRY. Thank you very much, Mr. Chairman. I will be very brief. I am not going to have a full opening statement.

I would like to associate myself with the comments of Senator Packwood and a few others, and simply say that I am glad we are having this hearing and I am glad that you have circulated the draft committee proposal.

I am troubled by it in a number of different respects and that is precisely why we are having these hearings and what this process is about.

It has only been six years that we have really had a national structure with respect to cable regulation, and I am particularly troubled by whatever form of return to the franchising authorities that might occur, whether or not it is in keeping with FCC procedures. I think that has the potential to return us to the very point of departure of some years ago, and I am troubled by it.

I am also troubled by the fact that I think some of this debate thus far has been driven by hyperbole and exaggeration and misunderstanding of a good number of the facts, figures, costs and relationships that are involved here, none of which are incidently easy.

I look forward to this process, this hearing and our own quiet, private deliberations, to try to really ascertain what will happen to the playing field here.

We have a bad record in Congress of adjusting playing fields and winding up with a lot of unintended consequences that result not in a level playing field, but on a total tilt in a different direction. And I would like to be very certain that whatever we do takes into account the transitional nature of the industry we are trying to regulate right now.

It is very hard to draw a fair picture of where we are going to go at a time when there are so many new technologies coming on line, many of which represent very real, new competition under the current structure.

So I just want to be careful to understand, as a Committee, as Senator Packwood said, just how many rate excess situations there are, and when measured against the industry as a whole whether you need sweeping legislation to deal with all of that.

Clearly, we need to address the horizontal, vertical issues and I have confidence that we will in a way that I think will be acceptable, but I do want to be careful that we do not rush in a way that runs over some of the realities here and that ignores the delicacy of the most mosaic of this industry, which is really still developing.

So I look forward to this process, Mr. Chairman and I thank you for your open and patient willingness to keep it open and to listen to us.

Senator INOUYE. Thank you.

Senator Stevens.

OPENING STATEMENT BY SENATOR STEVENS

Senator STEVENS. Mr. Chairman, I hope now that the issue has been raised, and I do not disagree that it should have been raised in view of all of the comments and bills that have been introduced, that we realize we have to do something.

I represent an area that is not completely served by cable yet. As a matter of fact, I do not even have cable in my house in Washington. I think that the great problem is that the financing mechanisms for the continued development of cable and television and programming, all of the mechanisms that we are using now to expand the educational opportunities for Americans, entertainment opportunities.

It is in limbo right now until we act. There is too many suggestions out here and I think that we ought to find some way to find a way to pass a bill that will calm this thing down. There may have to be some guidelines for service—the industry has an agreement on service, I think.

But I would hope that our goal would be to restore the momentum for the financing of a continued expansion of this industry that has done pretty well in the last six years and as far as I am concerned it still has a long way to go in Alaska.

So I would like to see something done this year.

Senator INOUYE. I hope that all of you here assembled will note the presence of the multitude of senators. This should indicate to one and all that we take this matter before us with great seriousness.

[The bill follows:]

101st CONGRESS
1st Session

S. 1880

To amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes.

IN THE SENATE OF THE UNITED STATES

November 15 (legislative day, November 6), 1989

Mr. Danforth (for himself, Mr. McCain, Mr. Hatch, Mr. Gore, Mr. Ford, Mr. Lieberman, Mr. Lott, Mr. Warner, Mr. Burdick, Mr. Pryor, Mr. Gorton, Mr. Burns, Mr. Metzenbaum, Mr. Bumpers, and Mr. Pressler) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

---

A BILL

To amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Cable Television Consumer Protection Act of 1989".

FINDINGS

SEC. 2. The Congress finds and declares the following:

(1) Pursuant to the Cable Communications Policy Act of 1984, rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about twenty-four to thirty, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation.

(2) Due to the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, and because of local franchising requirements, most cable television subscribers have no opportunity to select between competing cable systems.

(3) There is a substantial governmental and first amendment interest in promoting a diversity of views provided through multiple technology media.

(4) There is a substantial governmental and first amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed in section 396(a)(5) of the Communications Act of 1934 (47 U.S.C. 396(a)(5)), for the specific purpose of encouraging "public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation".

(5) A primary objective and benefit of our Nation's system of regulation of television and radio broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

(6) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

(7) Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those

who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(8) There has been substantial increase in the penetration of cable television systems over the past decade, with cable television services now available to 73,900,000 of the 90,400,000 households with televisions. Over 56 percent of the households with televisions subscribe to cable television, and this percentage is likely to increase.

(9) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

(10) Cable television systems and broadcast television stations increasingly compete for television advertising revenues. As the proportion of households subscribing to cable television increases, proportionately more advertising revenues will be reallocated from broadcast to cable television systems.

(11) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby at-

tract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or to reposition a broadcast signal to a disadvantageous channel position. There is a substantial likelihood that absent the reimposition of such a requirement, additional local broadcast signals will be deleted, repositioned, or not carried.

(12) As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.

(13) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception

system, or cannot otherwise receive broadcast television services.

(14) Cable television systems often are the single most efficient distribution system for television programming. A government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.

(15) The compulsory license was created by Congress as part of a delicate balance between cable television systems and broadcast television stations that included mandatory carriage obligations for cable systems. Cable systems are able to procure programming through the compulsory license at a cost substantially below the cost paid by the broadcast television stations. Cable systems, however, may rely upon the compulsory license as an alternative to negotiating for such programming in the marketplace, but are no longer subject to mandatory carriage obligations. This has created a competitive imbalance between the two industries.

(16) The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a

reduction in the number of media voices available to consumers.

(17) The cable television industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This makes it more difficult for non-cable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.

(18) The Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators. Franchising authorities are finding it difficult under the current regulatory scheme to deny renewals to cable systems that are not adequately serving cable subscribers. Franchising authorities have been constrained from imposing technical standards more stringent than the minimal standards of the Federal Communications Commission.

(19) Cities are increasingly being subjected to first amendment challenges by cable operators and potential cable operators. Given the lack of clear guidelines in

applying the first amendment to cable franchise decisions, cities are unreasonably exposed to potential damage claims.

DEFINITIONS

SEC. 3. (a) Section 602(2) of the Communications Act of 1934 (47 U.S.C. 522(2)) is amended to read as follows:

"(2) the term 'basic cable service' means any service tier or tiers which include the retransmission of local television broadcast signals or any public, educational, or governmental access channel;".

(b) Section 602(8) of the Communications Act of 1934 (47 U.S.C. 522(8)) is amended to read as follows:

"(8) the term 'franchise' means any authorization issued by a franchising authority, including a renewal of an authorization which has been granted subject to section 626, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;".

(c) Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended—

(1) by striking "and" at the end of paragraph (15);

(2) by striking the period at the end of paragraph (16) and inserting in lieu thereof a semicolon; and

(3) by adding at the end the following new paragraphs:

"(17) the term 'available to a household' or 'available to a home' when used in reference to a multichannel video programming distributor means a particular household which is a subscriber or customer of the distributor or a particular household which is actively and currently sought as a subscriber or customer by a multichannel video programming distributor;

"(18) the term 'cable community' means the households in the geographic area in which a cable system provides cable service;

"(19) the term 'multichannel video programming distributor' means a person such as, but not limited to, a cable system, a multichannel multipoint distribution service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;".

REGULATION OF CABLE RATES

SEC. 4. (a) Section 623(b) of the Communications Act of 1934 (47 U.S.C. 543(b)) is amended to read as follows:

"(b)(1) A franchising authority is authorized to regulate rates of a cable system for the provision of basic cable service and for installing or renting equipment necessary for the receipt of basic cable service if the franchise authority determines that the cable system is not subject to effective competition.

"(2) Under this subsection, cable systems shall be presumed to be subject to effective competition if—

"(A) fewer than 30 percent of the households in the cable community subscribe to the cable service of such cable system; or

"(B) the cable community is served by more than one multichannel video programming distributor.

For purposes of subparagraph (B), a cable community shall be considered as served by more than one multichannel video programming distributor if (i) comparable video programming is available at comparable rates to at least 67 percent of the households in the cable community from a competing cable system, multichannel multipoint distribution service, direct broadcast satellite program distributor, television receive-only satellite program distributor, or other competing multichannel video programming distributor, and (ii) the number of households subscribing to programming services offered by such competing multichannel video programming distributor, or by a combination of such distributors, is in the aggregate at least 30 percent of the households in the cable community.".

(b) Section 623(c) of the Communications Act of 1934 (47 U.S.C. 543(c)) is amended to read as follows:

"(c) A franchising authority authorized to regulate rates under this section shall, in consultation with the Commission and the operator of any affected cable system and other relevant persons, establish a fair and efficient method for such regulation.".

REQUIREMENT TO CARRY LOCAL BROADCAST SIGNALS

SEC. 5. (a) Part II of title VI of the Communications Act of 1934 (47 U.S.C. 531 et seq.) is amended by inserting immediately after section 613 the following new section:

"CARRIAGE OF LOCAL BROADCAST SIGNALS

"SEC. 614. (a) Each cable operator that relies upon compulsory licensing pursuant to section 111 of title 17, United States Code, for secondary transmissions by its cable system (hereafter in this section referred to as a 'participating operator') shall carry the signals of qualified local broadcast stations in accordance with the provisions of this section.

"(b)(1) A participating operator of a cable system with twelve or fewer usable activated channels shall carry the signals of a minimum of three qualified local broadcast stations.

"(2) A participating operator of a cable system with more than twelve and fewer than one hundred twenty-five usable activated channels shall carry the signals of qualified local broadcast stations, at a minimum, as follows:

Number of cable channels	Number of Television signals
13 to 20	4
21 to 29	7
30 to 33	10
34 to 37	11

38 to 41	13
42 to 45	14
46 to 49	15
50 to 53	17
54 to 57	18
58 to 61	19
62 to 65	21
66 to 69	22
70 to 73	23
74 to 77	25
78 to 81	26
82 to 85	27
86 to 89	29
90 to 93	30
94 to 97	31
98 to 101	33
102 to 105	34
106 to 109	35
110 to 113	37
114 to 117	38
118 to 121	39
122 to 125	41

"(3) A participating operator of a cable system with more than one hundred twenty-five usable activated channels shall carry, at a minimum, the number of signals of qualified local broadcast stations that is equal to one-third of the aggregate number of usable activated channels of such system.

"(c) Among the signals of qualified local broadcast stations which a participating operator of a cable system is required to carry under this section—

"(1) the signal of at least one qualified noncommercial educational television station or translator shall be carried by a participating operator of a cable system with fewer than fifty-four usable activated channels; and

"(2) the signals of at least two qualified noncommercial educational television stations or translator shall be carried by a participating operator of a cable system with fifty-four or more usable activated channels.

"(d)(1) Whenever the number of qualified local broadcast stations exceeds the minimum number of signals of such stations that a participating operator of a cable system is required to carry under this section, the participating operator shall have discretion in selecting which signals shall be carried on its cable system in order to meet the carriage requirements of this section; except that (A) carriage of qualified noncommercial educational television station signals pursuant to subsection (c) is nondiscretionary and (B) if the participating operator elects to carry an affiliate of a broadcast network entity, such operator shall carry the affiliate of such broadcast network entity whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is closest to the principal headend of the cable system. The carriage of each signal of a qualified local broadcast station shall be included in determining whether a participating operator of a cable system has complied with the requirements of this section, even if the signal of one such station substantially duplicates that of another station. For purposes of this paragraph, the term 'broadcast network entity' means an organization which produces programs available for simultaneous transmission by 10 or more affiliated broadcast stations and which has distribution locality or circuits available to such affiliated stations at least twelve hours each day.

"(2) Each signal carried in fulfillment of carriage obligations of a participating operator of a cable system under this section shall be carried on the cable system channel number on which the qualified local broadcast station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the broadcaster, or on such other channel number a mutually agreed upon by the broadcaster and the participating operator. Any disputes regarding the positioning of a qualified local broadcast station shall be resolved by the franchising authority.

"(3) A participating operator of a cable system shall carry in its entirety the primary video and accompanying audio transmission of each of the qualified local broadcast stations the operator selects to carry in accordance with this section. Retransmission of material in the vertical blanking interval or other enhancements of the primary video and audio signal (including multichannel sound, teletext, and materials carried on subcarriers) shall be within the discretion of the participating operator.

"(4) The signals of a qualified local broadcast station that are carried on the cable system of a participating operator shall be carried without material degradation.

"(5) A participating operator of a cable system shall not be required to carry the signal of any qualified local broadcast station that substantially duplicates the signal of another qualified local broadcast station that is carried by the operator.

"(6) Signals carried in fulfillment of carriage obligations of a participating operator under this section shall be available on the lowest priced tier of service separately available to each cable subscriber to which subscription is required for access to all other tiers of service. Such signals shall be viewable via cable on all television receivers of a subscriber connected to a cable system by a cable operator. If a participating operator of a cable system authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment or materials for such connections, the operator shall notify such subscribers in writing of all broadcast stations within fifty miles of the principal headend of the cable system that are not available without a cable converter box and shall offer to sell or lease such a converter box to such subscribers.

"(7) A participating operator shall identify, upon request by any person, those signals carried in fulfillment of the signal carriage obligations of the operator under this section.

"(8) A participating operator of a cable system shall provide written notice to a qualified local broadcast station, the franchising authority of such cable system, and subscribers of such cable system at least thirty days prior to either deleting from carriage or repositioning the signal of a qualified local broadcast station. No such deletion or repositioning shall occur during a sweeps period in which major television rating services measure the size of audience of qualified local broadcast stations.

"(9) A participating operator of a cable system shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local broadcast station carried in fulfillment of signal carriage obligations of the operator under this section, except that any such station may be required to bear any cost associated with delivering to the headend of the cable system a signal of the quality defined in section 602(24).

"(e)(1) Whenever a qualified local broadcast station believes that a participating operator of a cable system has failed to comply with the signal carriage requirements of this section, except requirements under subsection (d)(2) regarding station positioning, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable system has failed to comply with such requirements and state the basis for such allegations.

"(2) The Commission shall afford such participating operator an opportunity to present data, views, and arguments to establish that the operator has complied with the signal carriage requirements of this section.

"(3) Within one hundred-twenty days after the date a complaint is filed under this subsection, the Commission shall determine whether the participating operator has complied with the requirements of this section. If the Commission determines that the participating operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the participating operator has fully complied with such requirements, the Commission shall dismiss the complaint.".

(b)(1) Section 602 of the Communications Act of 1934 (47 U.S.C. 522), as amended by section 3 of this Act, is further amended by adding at the end the following new paragraphs:

"(20) 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use;

"(21) 'headend' means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers;

"(22) 'principal headend' means—

"(A) the headend, in the case of a cable system with a single headend, or

"(B) in the case of a cable system with more than one headend, the headend designated by the participating operator as the principal headend, except that such designation shall not undermine or evade the requirements of section 614;

"(23) 'qualified commercial station' means any television broadcast station which is not a qualified noncommercial educational television station and which is determined by the Commission to be a commercial station; such term shall not include low-power television stations, television translator stations, and other passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

"(24) 'qualified local broadcast station' means any television broadcast station licensed and operating on a channel regularly assigned to its community by the Commission (except where such station would be considered a distant signal under section 111 of title 17, United States Code) that, with respect to a particular cable system—

"(A) is licensed to a community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is within fifty miles of the principal headend of the cable system, and which delivers to the cable system principal headend either a signal level of −45 dBm for UHF signals and −49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal, and

"(B) is either a qualified commercial station or a qualified noncommercial educational television station;

"(25) 'qualified noncommercial educational television station' means any television broadcast station which—

"(A) under the rules and regulations of the Commission is eligible to be licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

"(B) is owned or operated by a municipality and transmits only noncommercial programs for educational purposes;

such term includes (i) the translator of any noncommercial educational television station with five watts or higher power serving the cable community, (ii) a full service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (iii) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations; and

"(26) 'usable activated channels' means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission.".

(2) Paragraph 5 of section 612(b) of the Communications Act of 1934 (47 U.S.C. 532(b)) is amended to read as follows:

"(5) For the purposes of this section, the term 'commercial use' means the provision of video programming, whether or not for profit.".

FRANCHISE RENEWAL; NEW FRANCHISE ISSUANCE

SEC. 6. (a) Section 626(a) of the Communications Act of 1934 (47 U.S.C. 546(a)) is amended—

(1) by striking "the franchise expiration" and inserting in lieu thereof "any franchise expires"; and

(2) by inserting "incumbent" immediately after "request of the".

(b) Subsection (b)(1) of section 626 of the Communications Act of 1934 (47 U.S.C. 546) is amended to read as follows:

"(b)(1) Upon completion of a proceeding under subsection (a), the franchising authority shall issue written requests for—

"(A) a renewal proposal from the incumbent cable operator; and

"(B) proposals for a new franchise from any other person who shall have notified the franchising authority in writing of its interests in providing cable service over a cable system in the relevant area.".

(c) Section 626(b)(3) is amended by striking "proposal" and inserting in lieu thereof "proposals".

(d) Subsection (c) of section 626 of the Communications Act of 1934 (47 U.S.C. 546) is amended to read as follows:

"(c)(1) After the expiration of the date for the receipt of franchise proposals under subsection (b)(3), the franchising authority shall provide prompt public notice of such proposals and, at the request of an interested party, including subscribers, or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2), to determine the disposition of the proposals in light of community needs and interests. In determining the disposition of the proposals, the franchising authority may consider—

"(A) whether the incumbent cable operator has substantially complied with the material terms of the existing franchise and with applicable law and regulations;

"(B) whether the quality of the incumbent cable operator's service, including signal quality, rate making history, response to consumer complaints, and billing practices, has been reasonable in light of community needs;

"(C) whether the parties submitting proposals pursuant to subsection (b), including the incumbent cable operator, have the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in their proposals;

"(D) whether the proposals submitted pursuant to subsection (b), including the incumbent's renewal proposal, are reasonable to meet the community's future cable-related needs and interests, taking into account the cost of meeting such needs and interests; and

"(E) any other factors reasonably determined by the franchising authority to be necessary to advance and protect the public interest in the operation of a cable system.

"(2) In any proceeding under paragraph (1), parties submitting proposals and other interested parties, including subscribers, shall be afforded adequate notice, and the franchising authority and parties submitting proposals shall be afforded a fair opportunity for participation.

"(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision based upon the record of such proceeding, and transmit a copy of such decision to parties submitting proposals. Such decision may grant or deny any or all of the proposals and shall state the reasons therefor; except that if the franchising authority finds that the performance of the incumbent cable operator under the franchise during the then current franchise term and the renewal proposal of the incumbent cable operator satisfy the standards specified in paragraph (1), the franchising authority shall grant the incumbent cable operator's renewal proposals.".

(e) Section 626 of the Communications Act of 1934 (47 U.S.C. 546) is amended by striking subsections (d) and (g) and by redesignating subsections (e), (f), and (h) as subsections (d), (e), and (f), respectively.

(f) Subsection (d) of section 626 of the Communications Act of 1934 (47 U.S.C. 546), as so redesignated, is amended—

(1) in paragraph (1)—

(A) by striking "cable operator whose proposal for renewal has been denied" and inserting in lieu thereof "person submitting a proposal who is aggrieved";

(B) by inserting "who" immediately before "has been adversely"; and

(C) by striking "appeal" and inserting in lieu thereof "seek judicial review of"; and

(2) in paragraph (2), by amending subparagraph (B) to read as follows:

"(B) the final decision of the franchising authority is not arbitrary or capricious.".

(g) Subsection (e) of section 626 of the Communications Act of 1934 (47 U.S.C. 546), as so redesignated, is amended by striking "for renewal".

(h) Subsection (f) of section 626 of the Communications Act of 1934 (47 U.S.C. 546), as so redesignated, is amended to read as follows:

"(f) Notwithstanding the provisions of subsections (a) through (e), an incumbent cable operator may submit a renewal proposal pursuant to this subsection at any time before the expiration of the time period specified in subsection (a), and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such renewal proposal at any time thereafter (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (e) shall not apply to a decision to grant or deny a renewal proposal under this subsection.".

(i) The heading for section 626 of the Communications Act of 1934 (47 U.S.C. 546) is amended to read as follows:

"RENEWAL; NEW FRANCHISE ISSUANCE".

LIMITATIONS ON FRANCHISING AUTHORITY LIABILITY

SEC. 7. Part III of title VI of the Communications Act of 1934 (47 U.S.C. 621 et seq.) is amended by adding at the end the following new section:

"LIMITATIONS ON LIABILITY

"SEC. 628. (a) In any claim asserting constitutional rights under the First Amendment against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, arising from the regulation of cable communications or a decision to grant or not grant a franchise or to otherwise regulate a cable operator in a manner permitted by this title or other Federal, State, or local law, any relief, to the extent such relief is required by any other provision of law, shall be limited to injunctive relief, declaratory relief, and attorney's fees.

"(b) Nothing in this section shall be construed as limiting the relief authorized with respect to any claim against a franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity, to the extent such claim involves activities of such authority or entity as an owner of a cable system.

"(c) Nothing in this section shall be construed as creating or authorizing liability of any kind, under any law, for any action or failure to act relating to cable communications or the granting of a franchise by any franchising authority or other governmental entity, or any official, member, employee, or agent of such authority or entity.".

REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT

SEC. 8. (a) Section 624(a) of the Communications Act of 1934 (47 U.S.C. 544(a)) is amended by striking "not" and "except".

(b)(1) Section 624(b)(1) of the Communications Act of 1934 (47 U.S.C. 544(b)(1)) is amended—

(A) by striking ", but may not establish requirements" and inserting in lieu thereof "and"; and

(B) by striking "information".

(2) Section 624(b)(2) of the Communications Act of 1934 (47 U.S.C. 544(b)(2)) is amended—

(A) by inserting "such" immediately before "requirements"; and

(B) by striking all after "franchise" and insert in lieu thereof a period.

(3) Section 624(b) of the Communications Act of 1934 (47 U.S.C. 544(b)) is amended by adding at the end the following: "In establishing such requirements under paragraph (1), a franchising authority shall, in its discretion and based upon the needs and interests of the cable community, specifically identify those broad categories of programming and other services that are essential to the operation of a cable system in the public interest in that community. The required broad categories of video programming may include, but are not limited to, broadcast or other programming that is in a particular foreign language or is of particular interest to a minority group comprising a significant portion of the population in the cable community.".

(c) Section 624(e) of the Communications Act of 1934 (47 U.S.C. 544(e)) is amended to read as follows:

"(e) The Commission shall establish minimum technical standards relating to the facilities and equipment of cable systems suitable to ensure adequate technical operation and signal quality, and periodically shall update such standards to reflect improvements in technology. A franchising authority may require and enforce these standards, adjusted as appropriate for the particular circumstances of the local cable system and cable community. Any person, including but not limited to a cable subscriber or franchising authority, who is aggrieved by failure of a cable operator to meet the technical standards requirements of a franchise may petition the Commission for an order compelling compliance with the franchise; except that nothing in this subsection shall be construed to limit the ability of such a person to seek any other remedy that may be available under the franchise agreement or State or Federal law or regulation.".

(d) Subsection (f) of section 624 of the Communications Act of 1934 (47 U.S.C. 544) is repealed.

NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

SEC. 9. Title VII of the Communications Act of 1934 (47 U.S.C. 701 et seq.) is amended by inserting immediately after section 705 the following new section:

"NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

"SEC. 705A. (a) No person engaged in the production, creation, or distribution of video programming who is owned or controlled by, or affiliated through substantial common ownership with, one or more cable systems shall discriminate in the price, terms, conditions, or availability of sale of its programming among cable systems, cable operators, or other multichannel video programming distributors who purchase such programming for the purpose of delivery to consumers; except that (1) such person may impose reasonable, non-discriminatory requirements for creditworthiness, service, and financial stability and (2) nothing in this section shall prohibit price differentials which are attributable to differences in cost in the creation, sale, delivery, or transmission of such programming or which are made in good faith to meet the equally low price of a competitor.

"(b) As used in this section, the terms 'cable system', 'cable operator', 'multichannel video programming distributor', and 'video programming' have the meaning given such terms in section 602 of this Act.".

ACQUISITION LIMITATIONS

SEC. 10. Subsection (f) of section 613 of the Communications Act of 1934 (47 U.S.C. 533) is amended to read as follows:

"(f)(1) On and after November 1, 1989, except as provided in paragraphs (2) and (3), no cable operator shall control, directly or indirectly, any cable system or systems that individually or collectively provide service to more that 15 percent of all cable television subscribers in the United States.

"(2) A cable operator that controls, as of November 1, 1989, any cable system or systems that exceed the percentage of service described in paragraph (1) shall be deemed not to be in violation of paragraph (1) if the cable operator—

"(A) does not acquire any additional interest in any cable system until the cable system or systems under the control of the cable operator do not exceed such percentage; and

"(B) reduces its interests in cable systems so that, no later than three hundred sixty days after the date of enactment of this subsection, the cable system or systems under the control of the cable operator do not exceed such percentage.

"(3) If at any time the Commission determines that enforcement of the requirements of paragraph (1) with respect to a cable operator would, due to no fault of the operator, cause severe economic harm or substantial disruption of service to subscribers, the Commission may waive such requirements for a reasonable period not to exceed six months.

"(4) For purposes of this subsection, in determining the extent of control a cable operator has with respect to any cable system, the Commission shall, to the extent practicable, follow the principles reflected in notes 1 through 4 of section 73.3555 of title 47, Code of Federal Regulations, as in effect on the date of enactment of this subsection.".

JUDICIAL REVIEW

SEC. 11. Section 635 of the Communications Act of 1934 (47 U.S.C. 555) is amended by adding at the end the following new subsection:

"(c)(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 614 of this Act or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

"(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 614 of this Act or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than twenty days after entry of such judgment, decree, or order.".

SEPARABILITY

SEC. 12. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application as to which it is held invalid, shall not be affected thereby.

EFFECTIVE DATE

SEC. 13. Except as otherwise specified in this Act, the requirements of this Act shall be effective sixty days after the enactment of this Act. The Commission may promulgate such regulations as it determines necessary to interpret such requirements that are not inconsistent herewith.

○

Senator INOUYE. And with that, I would like to call the first panel, consisting of the President of the National Cable Television Association, Mr. James P. Mooney; the Chairman and Chief Executive Officer of the Continental Cablevision, Incorporated of Boston, Massachusetts, Mr. Amos B. Hostetter; and the President and Chief Executive Officer of LifeTime, Astoria Studios of New York, Mr. Thomas Burchill.

Gentlemen, I welcome you, and we await your words.

May I first recognize Mr. Mooney.

STATEMENT OF JAMES P. MOONEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. MOONEY. Mr. Chairman, we have submitted an extensive statement which we hope will be a part of your record.

Senator INOUYE. We have received statements from all of the witnesses and I will assure you that all of these statements will be made part of the record if they are summarized in the oral presentation.

Mr. MOONEY. Thank you, sir. Mr. Chairman, in the several hearings on cable issues which have been held by the Subcommittee, we have given our view that excepting matters such as ""must carry" we would prefer that the cable industry be allowed to continue to be deregulated.

We have buttressed this view with showings of the remarkable progress our industry has made over the past six years in bringing new and diverse television programming to the American people.

We have made the point too that while there occurred a spurt in cable prices in the two years immediately subsequent to deregulation, those prices have now leveled off. I think it appropriate in this respect to note that according to the Bureau of Labor Statistics, cable customer bills in 1989 increased at a rate less than the overall rate of inflation.

We have taken steps also to improve the service we extend to our customers. Customer service has been a very high business priority for most of our companies and last month we issued new industry-wide customer service standards intended to raise all of our companies responsiveness to our customers when they call us on the phone to order cable service or ask questions about their bills or to request repairs.

These two trends, moderation in rates and emphasis on customer service, represent not only a response to the concerns expressed by this committee and other members of Congress but are simply good business.

Our customers seem to think that overall we are doing a pretty good job. According to a poll published last week by the Wall Street Journal, our customers give us an overall approval rating of 62 positive to 18 percent negative. That certainly is not perfect and leaves us a way to go, but all in all, it is not bad either.

But we are realists too, and while we would rather not have renewed regulation, it is quite clear to us that this committee believes regulatory adjustments are necessary.

You have made clear your desire for a cable bill. Our response will be to cooperate with you. We will give you our best advice and counsel as the legislative process moves forward, and to the greatest degree possible, we will help you identify not only precise definitions of what the problems are, but also solutions to those problems.

At this point I would make just three general observations which we hope you will take into account as you consider legislative alternatives. First, cable is a national as well as a local medium. To turn control of our industry back to city councils would, in our view, merely recreate the irrational and haphazard conditions which existed prior to 1984.

Our experience has been that city councils are political bodies with none of the quasi-judicial qualities normally found in regulatory agencies, and while local governments do have a proper role in cable, they need very detailed guidance if the results of their involvement are to be both rational and fair.

Second, the programming side of our business is just now beginning to flower and is still very fragile. Regulation of our cable programming channels such as Lifetime, the Discovery Channel, Arts and Entertainment, C-SPAN and Black Entertainment Network, to name just a few, would not only go farther than the regulation permitted by the FCC prior to passage of the Cable Act, but also would immediately cast a pall on the development of new programming and new channels.

Finally, we respectfully urge that as you consider proposals intended to stimulate new competition for cable, you also keep in mind that we bear unique regulatory burdens and costs under the Cable Act which are not shared by our competitors, and I am not talking about abstract or imprecise concepts of public trusteeship.

To put a local flavor on it, in Montgomery County, Maryland, for example, the cable system will this year pay the county government 14 percent of its gross revenues, in cash, off the top, for franchise fees, access fees and other taxes, none of which would apply to our competitors, and that is before you calculate the cost of the access channels and the institutional and governmental networks the system also is required to provide by the franchise authority.

To leave intact this situation and then to mandate that our competitors get most favored nation prices for our programming, without having to shoulder the same regulatory costs would destroy the cable industry rather than stimulate competition.

None of this is to say, though, that a reasonable cable bill cannot be devised and we will do our level best to work with the Committee, toward a result which not only allow our companies to continue to bring new diversity to the world of television but also will ensure that abuses are prevented in the conduct of the business.

Thank you, Mr. Chairman, I will be happy to answer any questions.

[The statement follows:]

STATEMENT OF JAMES P. MOONEY
PRESIDENT AND CHIEF EXECUTIVE OFFICER
NATIONAL CABLE TELEVISION ASSOCIATION

I. INTRODUCTION

Mr. Chairman and members of the Committee, my name is James P. Mooney. I am President and Chief Executive Officer of the National Cable Television Association. NCTA represents more than 2,700 cable television systems, serving 80% of the more than 53 million cable households in the United States; it also represents 56 cable programming services engaged in creating and distributing a broad range of programs for cable television.

Thank you for inviting me to testify at today's hearing. NCTA welcomes the opportunity to respond to the staff draft and comment on cable issues of concern to members of this Committee. We are aware that a great deal of effort has gone into the draft over the past four months and that it represents a conscientious effort to identify many of the different issues that might fit under the rubric of an amendment to the Cable Communications Policy Act of 1984.

However, NCTA believes that the committee staff draft goes too far in addressing whatever problems have occurred since the deregulation of cable rates in 1987. Indeed, NCTA believes that many of the draft's findings and legislative provisions are unwarranted based on (1) the record compiled by this Committee and (2) recent developments in the cable industry. Moreover, there will be numerous unintended negative consequences for both the cable industry and consumers if either S. 1880 or the draft substitute is enacted. However, we look forward to working with each and every member of this

this Committee and your staff to determine what amendments to the Cable Act of 1984 might be appropriate.

As NCTA has testified at previous hearings, we believe the record clearly demonstrates that the Cable Act has benefitted consumers. Cable operators have increased channel capacity, improved picture quality, and made new programming choices available to their subscribers. A recent Wall Street Journal/NBC News poll underscored this point when it asked consumers to rate their local cable TV company: 62 percent replied that they had positive feelings while only 18 percent felt negatively.[1] However, we can and will do better, especially if the incentives to continue investing in the cable industry are preserved.

II. KEY ISSUES BEFORE THE COMMITTEE

This Committee has focused a great deal of attention on two issues that directly affect cable subscribers: rates and customer service. Although rates have stabilized and the industry has moved forthrightly to adopt customer service standards, the perception continues in some circles that rates are rising too rapidly and that operators are not responding fast enough to the needs of their subscribers.

---

1. Wall Street Journal, March 19, 1990; p. B1.

In an effort to respond to these perceptions, there is great risk that Congress, if it embraces sweeping reregulation of the cable industry, could inadvertently weaken what most people agree is our greatest strength -- programming. In this area, we are exceeding all expectations for bringing the promise of the 1984 Cable Act to fruition. Yet reimposition of sweeping rate regulation just three years after deregulation will choke off investment in programming and stifle the creation of greater diversity and better quality television for all. This is the greatest hazard associated with the staff draft and one which I will discuss in greater detail after reviewing the core issues of the cable debate -- rates and customer service.

A. Rates

After a major national survey, the General Accounting Office reported last August that during the first 23 months of deregulation (December 1986 - October 1988), the average monthly price of basic cable television service rose from \$11.70 to \$14.77, an increase of 26%, while the average subscriber's monthly bill went from \$21.58 to \$24.68, an increase of 14%. The GAO calls this last number "the bottom line", and said that it represented an increase of 8% in "constant dollars" (adjusted for inflation) in the average subscriber's monthly bill.[2] It also meant that while basic rates increased after deregulation, the cost of premium services such as HBO, Showtime, and Cinemax declined.

1. Rate increases between 1986 and 1988 reflected normal adjustments after years of city council regulation

The rate increases reported by the GAO are not inconsequential. They do, however, reflect an initial period of post-deregulatory adjustment. Between 1972 and 1986, city council regulation kept cable rates a full 72 points behind the consumer price index. When cable rates were effectively deregulated in January 1987, it was natural for prices to rise after years of being kept artificially low.

It is important to note that operators have not tried to recapture everything lost to inflation before 1987. In 1972, the average price of basic cable service was $5.85 and consumers received only 5 or 6 channels. Had basic service prices simply kept pace with inflation, the average price would have grown to $16.54 in 1988. Yet the average basic rate in 1988 was

---

[2] The GAO also reported that the average price of the "lowest priced basic service" increased 29% over the same period, from $11.43 to $14.48, and that the average number of channels provided as part of this service increased from 23.8 to 30.1. As the GAO pointed out, however, "Since most systems have only one tier of basic service the most popular service is generally also the lowest priced service" (pg. 23). This being the case, it seems to us appropriate to treat the "most popular" service statistics as more significant for purposes of this analysis.

$14.77 — 12% below the inflated 1972 price. Furthermore, subscribers received an average of 32, not 5 or 6, channels of basic cable service.

2. Channel capacity has increased

With the increase in rates between 1986 and 1988 came greater channel capacity. Although basic rates rose 26% during the first 23 months of deregulation, the number of channels received by subscribers rose 21% from an average of 26.6 in 1986 to 32.1 in 1988. Significantly, the GAO noted that as a result of cable systems increasing their channel capacity after deregulation, the average cost per channel stayed the same at approximately 45 cents per month. This fact is not reflected in section 2(1) of the staff draft's findings, which focuses on rate increases but not concomitant increases in service.

For about $15 a month, basic cable service is still the best entertainment value in America. It provides more than 30 channels of programming for the same price as a subscription to USA TODAY. It offers the average family a wide range of viewing options 24 hours a day for less than the cost of taking a family of four to the movies ($16.66), a professional baseball game ($30.44), or a Broadway production ($130.80). The average monthly cable bill is also about the same as the average monthly phone bill, yet cable is used by our customers an average of 7 hours a day as opposed to the average of 20 minutes a day spent using the phone. Clearly cable is a good value.

3. Rates have levelled off since 1988

Underscoring the "catch-up" nature of rate increases immediately after deregulation (1987-88) is the fact that cable rates levelled off in 1989. The Bureau of Labor Statistics (BLS) reports that cable prices lagged behind inflation in 1989, rising only 3.8% as compared to 4.6% for the CPI as a whole.

This trend is likely to continue in 1990 despite the fact that cable's CPI increased 3.0% in January and February (from 146.8 in December 1989 to 151.2 in February 1990) as compared with a 1.5% increase in the overall CPI (from 126.1 in December 1989 to 128.0 in February 1990). The reason is that many cable companies implement rate increases in December and the first several months of each year. In 1989, there was a similar rise in cable rates at the beginning of the year, when cable's CPI increased 2.1% in January and February as opposed to the general inflation rate of 0.9%.[3] However, by the end of 1989, cable's CPI was running behind the overall inflation rate, 3.8% to 4.6%.[4]

---

[3] Cable's CPI increased from 141.4 in December 1988 to 144.3 in February 1989 (2.1%), whereas the overall CPI increased from 120.5 in December 1988 to 121.6 in February 1989 (0.9%).

[4] Cable's CPI increased from 141.4 in December 1988 to 146.8 in December 1989 (3.8%), whereas the overall CPI increased from 120.5 in December 1988 to 126.1 in December 1989 (4.6%).

Although some of our detractors claim that cable rate increases are excessive, the statistics show that for 1989 they were below inflation. For 1990, the pattern witnessed so far has been predictable based on established patterns of rate adjustments in the cable industry.

As a further indication of how cable rates have levelled off, the Bureau of Labor Statistics reports that the cable component of the CPI for 1989 trailed other major entertainment components, as the following table demonstrates:[5]

Percentage Change in the Consumer Price Index for Various Goods and Services During 1989

	December 1988	December 1989	Percentage Change
OVERALL CPI:	120.5	126.1	4.6%
Cable Television:	141.4	146.8	3.8%
Entertainment Items			
Newspapers:	126.6	131.1	3.9%
Magazines, periodicals, & books:	126.6	133.3	5.3%
Fees for participant sports (e.g. golf and skiing):	113.2	121.9	7.7%
Fee for lessons or instruction:	109.8	119.6	8.9%
Admission (to movies, plays, sporting events, etc.):	133.3	146.0	9.5%

---

[5] Bureau of Labor Statistics; comparison of December 1988 CPI to December 1989 CPI.

4. Summary: Rates

NCTA believes that the record is clear: (1) cable prices did increase immediately after deregulation, but these increases reflected a predictable "catch-up" period after 14 years during which city councils held rates artificially low; (2) the revenues from these higher rates were reinvested in plant and programming, which led to the creation of better television programming and more choices for consumers; and (3) rates have levelled off since 1988 and reflect the general economy. Based on these facts, there is no record for sweeping reregulation of the cable industry.

B. CUSTOMER SERVICE

1. The cable industry is committed to customer service

The cable industry has a right to be proud of the fact that it has provided consumers with a whole new world of television. First, we created new networks and innovative formats, from music television, 24-hour news, and public affairs networks to full-time children's channels, comprehensive entertainment services, and sports channels. Then, with rate deregulation, we were able to improve and expand the programming available to consumers. The public responded and subscribed to cable services in record numbers. Finally, over the course of 15 years, we built an entirely new communications infrastructure, marrying satellite technology with coaxial cable. The wiring of America was a colossal task: the cable industry now has more than 831,000 miles of plant which passes more than 80 million households.

Not surprisingly, our effort to build an entirely new infrastructure in such a relatively short period severely stretched our ability to provide the type of customer service we should.

To demonstrate our commitment to the consumer, and in response to concerns expressed by members of Congress and the public, the NCTA's Board of Directors adopted customer service standards on February 14, 1990. These voluntary standards address critical elements of customer service including office hours, telephone response time, installations, repairs, service calls, bills, and refunds. On February 15, the Community Antenna Television Association (CATA) also adopted the same standards. As a result, virtually every cable operator in the country has committed to improve customer service by implementing the standards no later than July 1991.

These standards are not a gimmick. They were developed by NCTA's Customer Relations Committee and a task force consisting of operations executives from the top 40 cable multiple system operators. The new standards, which focus on high-priority areas of service identified by consumers, are the product of months of discussion. They represent tangible, specific indications of the kind of service cable operators nationwide are committed to providing. Although anti-trust laws prohibit NCTA from making these standards compulsory, cities and states have the authority to enforce them by writing them into franchise agreements and local ordinances. The State of New York recently adopted analogous standards by statute.

2. NCTA's new customer service standards

The complete text of the standards follows:

RECOMMENDED CABLE INDUSTRY CUSTOMER SERVICE STANDARDS

February 14, 1990

The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming; reliable, clear signals; and prompt, courteous service. To that end, we, as an industry, have voluntarily adopted the following Standards for Customer Service.

Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, that the cable industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

1. **Office and Telephone Availability**

   A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquiries Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will staff telephones for supplemental hours on weekdays and/or weekends.

B. Under normal operating conditions, telephone answer time by a customer service representative, including wait time, and the time required to transfer the call, shall not exceed 30 seconds.

Those systems which utilize automated answering and distributing equipment will limit the number of routine rings to four or fewer. Systems not utilizing automated equipment shall make every effort to answer incoming calls as promptly as the automated systems.

This standard shall be met no less than ninety percent of the time measured on an annual basis.[6]

C. Under normal operating conditions, the customer will receive a busy signal less than three percent of the total time that the cable office is open for business.

D. Customer service center and bill payment locations will be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours on weekdays and/or weekends during which these centers will be open.

2. Installations, Outages, and Service Calls

Under normal operating conditions, each of the following four standards will be met no less than 95% of the time measured on an annual basis.

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are up to 125 feet from the existing distribution system.

B. Excluding those situations beyond the control of the cable operator, the cable operator will respond to service interruptions promptly and in no event later than 24 hours. Other service problems will be responded to within 36 hours during the normal work week.

---

[6] In certain smaller cable systems with fewer than 10,000 subscribers, systematic measurement of compliance with some of these standards (e.g. telephone answering time) will not be cost effective and should not be expected.

C. The appointment window alternatives for installations, service calls, and other installation activities will be (a) morning, (b) afternoon, or (c) all day during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours during which appointments can be set.

D. If, at any time an installer or technician is running late, an attempt to contact the customer will be made and the appointment rescheduled as necessary at a time which is convenient for the customer.

3. Communications, Bills, and Refunds

A. The cable company will provide written information in each of the following areas at the time of installation and at any future time upon request:
   * products and services offered
   * prices and service options
   * installation and service policies
   * how to use the cable service

B. Bills will be clear, concise and understandable.

C. Refund checks will be issued promptly, but no later than the earlier of 45 days or the customer's next billing cycle following the resolution of the request, and the return of the equipment supplied by the cable company if service is terminated.

D. Customers will be notified a minimum of 30 days in advance of any rate or channel change, provided the change is within the control of the cable operator.

Although customer service practices vary widely among the thousands of local cable systems in the United States, some systems already conform to the new standards. Those that do not are expected to comply fully by July 1991.

Once a cable system has fully achieved the standards, it can request a "Seal of Good Customer Service" from NCTA. It is then obligated to report annually to its local franchising authority and describe how it has met the standards. Under current federal law, local governments have the authority to set and enforce customer service requirements for cable systems.

The record is clear. NCTA and individual operators have listened to and are responding in a responsible manner to the concerns that have been expressed about customer service in the cable industry.

III. Carriage of Local Broadcast Signals

A. Historical Overview

Beginning in 1965, the FCC had in effect a complex collection of regulations that required cable systems to give free carriage to all local broadcast signals before providing cable consumers with any other programming service. Two challenges to these must carry rules, however, led the courts to invalidate them in the 1985 *Quincy* decision. The Commission replaced these rules, based on an inter-industry compromise between the broadcasting and cable industries, with more flexible, interim regulations in 1986; but these too were invalidated by the court in the *Century* decision.

Although the history of government-compelled signal carriage has been inconsistent since the FCC's rules were challenged in 1985, the pattern of voluntary carriage of broadcast stations by cable operators has been stable. Even in the absence of must carry rules, most cable systems continue to carry broadcast stations under the terms of the 1986 inter-industry carriage agreement.

Commercial broadcasters have become so confident they will be carried by cable systems that their main concern in this debate is no longer whether they will be carried -- they now assume that — but on which channel they think they should be carried. Beyond that, in 1985, when the court invalidated the old FCC rules, many broadcasters believed that they would perish without a federal law requiring carriage. Now some have come full circle and are arguing against such a law, demanding instead that they be paid by the cable operator for carriage.

In early 1988, the FCC, at the request of several leading members of Congress, conducted a survey regarding broadcast station carriage on cable systems in light of the Quincy and Century court decisions. NCTA also commissioned the consulting firm of Price Waterhouse to conduct a broadcast station carriage survey to supplement the FCC's survey. The Price Waterhouse study, which was conducted in the summer of 1988, focused on cable system carriage of broadcast stations, as well as carriage changes, as measured by the FCC's second set of must carry rules, which were struck down by the Century decision in December 1987.

Price Waterhouse found the following:

1. Ninety-eight percent (98%) of the broadcast stations qualified for carriage under the most recent FCC must carry rules are still carried on cable systems. This 98% figure includes the expanded carriage of public television stations that was required by the Commission.

2. Ninety-seven percent (97%) of the cable systems would still be in compliance with the post-Quincy rules if those rules were still in effect.

3. Ninety-one percent (91%) of the systems carrying qualified stations reported no repositioning of qualified stations.

4. Of the stations moved, eighty percent (80%) were repositioned to cable channels equal to or lower in number than the stations' over-the-air channel assignments.

5. Eighty-seven percent (87%) of qualified broadcast stations are currently carried on cable channels equal to or lower than the stations' over-the-air channel assignments.

The survey results demonstrate that in the absence of regulations, the cable industry has continued to carry stations qualified for carriage under the most recent must carry agreement. The FCC's study produced somewhat lower numbers for carriage because it used the pre-Quincy rules as a baseline. However, the FCC's conclusion — that the vast majority of local broadcast stations are still carried by local cable systems -- is the same one reached by Price Waterhouse.[7]

B. Must Carry Negotiations

As we have testified before this Committee on several occasions, NCTA supports Congressional enactment of a must carry statute to assure continued carriage of qualified local broadcast stations on cable systems. As a matter of public policy, NCTA agrees with on-channel carriage unless otherwise negotiated by the broadcaster and cable operator. Where it is not technologically possible to carry a broadcaster on his FCC assigned channel, or in cases of dispute, we support Chairman Inouye's proposal that the FCC develop rules for channel positioning. NCTA's main concern is that a must carry statute survive constitutional challenge in the courts, which previous FCC rules have not.

In the Quincy decision, which struck down the FCC's 20-year old must carry regime on July 19, 1985, the D.C. Circuit Court of Appeals found that:

(1) The must carry rules violated the First Amendment rights of cable programmers.

---

[7] FCC, Policy and Rules Division, Mass Media Bureau, "Cable Systems Broadcast Signal Carriage Survey Report," September 1988.

(2) The must carry rules violated the First Amendment rights of cable operators.

(3) The must carry rules violated the First Amendment rights of cable subscribers.

(4) The must carry rules could not be sustained in the name of preserving "localism" in broadcasting.

(5) Without empirical evidence of demonstrable harm to broadcasters resulting from lack of carriage, must carry rules cannot pass First Amendment scrutiny.

After the Quincy decision, the cable industry took an unprecedented step. Mindful of our public duties, our customers' preferences, and the political imperatives of Congress, NCTA entered into negotiations with the National Association of Broadcasters, the Television Operators Caucus, and the Association of Independent Television Stations (INTV). These negotiations produced a compromise in 1986 whereby NCTA agreed to ask the FCC to reimpose specific mandatory signal carriage rules.

The agreement was basically a scaled-down version of the former rules that provided for mandatory carriage of local signals, but which also recognized the First Amendment prerogatives of cable operators and provided them with some editorial discretion over their channels. Although the specifics of the deal were relatively complicated, it provided that any television station within 50 miles of the cable system which could demonstrate a threshold market share would qualify for free, mandatory carriage. Furthermore, it established a ceiling on the number of qualified stations that a cable operator could be required to carry. For example, cable systems with more than 20 but fewer than 27 channels could not be required to carry more than seven qualified stations, and systems with more than 27 channels could not be required to devote more than 25 percent of their channels to carrying qualified stations. (Systems with 20 or fewer channels were exempt from any mandatory carriage requirements.) In cases where the number of qualified signals exceeded the maximum number that a cable operator was required to carry, the operator could choose which ones to carry and could enter independent arrangements with the others.

The issue of channel positioning was covered in item 11 of a letter dated February 26, 1986, and signed by Edward O. Fritts, Margita E. White, and Preston Padden, spelling out the inter-industry compromise. This item, which is one of a group of twelve points that reflected everyone's understanding of the new rules, stated: "Systems are not required to carry stations on their channel positions, but must carry all qualified local stations in their entirety on the lowest priced tier." Thus, the joint industry petition asked the FCC for a new must carry rule which not only allowed continued flexibility as to channel designation for UHF stations, but also agreed to repeal all on-channel requirements for VHF stations.

It has long been an article of faith in the broadcasting industry that a UHF license is effectively converted into a VHF license by cable carriage, because the cable retransmission improves and extends the relatively weak UHF signal beyond its normal limitations and because carriage on cable channels 2 through 13 removes the need, inherent in off-air reception of

UHFs, for consumers to switch their TV sets to the UHF band. In addition, UHF broadcasters like being carried on low-numbered cable channels because they feel such positioning gives them a competitive advantage over cable programming networks.

One often hears broadcasters talk about the necessity of being carried on channels 2 through 13; anything higher is called "cable Siberia" by stations seeking not only free carriage, but also control of the cable operators' marketing plans and program packages. It is important to keep in mind that UHF broadcasters never had a rule through which they could force channel designation, and that the NAB, TOC, INTV and NCTA agreed as a part of their 1986 must carry compromise that the matter would remain within cable operators' discretion. It is also important to recall that "cable Siberia" -- those high numbered channels which UHF broadcasters deem unacceptable for cable carriage -- are in fact the same high numbered channels for which the broadcasters have sought and obtained a federal license to broadcast over the air.

In 1986, after a long and difficult series of proceedings, the FCC accepted the inter-industry compromise, with four major revisions.

First, special rules were added for public broadcast stations which, in effect, gave such stations preferential treatment over commercial stations. Specifically, local public broadcast stations would qualify for mandatory carriage without being required to demonstrate the threshold market share required of other stations. Moreover, as a general matter, operators with more than 20 but fewer than 54 available channels would be required to include at least one local public broadcast station and systems with 54 or more channels would be required to include at least two such stations.

Second, new commercial stations were exempted for one year from the requirement of demonstrating audience share. In other words, such stations were given preferential treatment compared to established commercial stations.

Third, the Commission, sua sponte, required cable operators to offer subscribers an input selection device (an A/B switch) that would allow consumers to change freely between television reception by cable and over the air broadcast signals. Cable operators were also required to conduct an educational campaign to inform consumers about the uses of the input selection device.

Fourth, the Commission decided to sunset all regulations except the A/B switch educational requirement after five years.

Century Communications challenged the new rules in the D.C. Circuit Court of Appeals and alleged that they, like the old rules, violated its

First Amendment rights.[8] In December 1987, the Court of Appeals again struck down the must carry regime, finding the record inadequate to justify the new rules in light of the First Amendment rights of cable operators, programmers, and subscribers.

Although NCTA filed comments supporting the compromise at the FCC, it was not obliged by the joint industry agreement to defend the constitutionality of the rules and did not attempt to do so, either in its comments to the FCC or in the court proceeding, leaving such efforts to the broadcast industry. Accordingly, NCTA did not participate in the Century case other than to urge the court not to stay the new ruling pending the appeal.

In the meantime, the court has clarified its decision to state that it only struck down the mandatory carriage requirements of the rules. The A/B switch provisions remain and, indeed, became effective November 1, 1989.

Since the Century decision, the cable industry has remained open and willing to join with broadcasters in seeking a legislative solution to the must carry issue. Last June, Mr. Edward Fritts, as the head of the principal trade association for both network and independent broadcasters, approached NCTA to discuss the possibility of whether we could reach a compromise agreement on must carry and jointly urge its inclusion in the Reconciliation Bill. Mr. Fritts and I were able to reach tentative agreement on a compromise. Final agreement was made contingent upon concurrence by the Community Antenna Television Association, the National Association of Public Television Stations, and the Association of Independent Television Stations.

---

[8] Century Communications is not a member of NCTA.

In general, the June 1989 agreement reflected the most recent FCC rules. However, NCTA also agreed to go beyond those rules — and to provide broadcast stations with an additional right, which had not been part of the FCC's rules, to be located "on channel" when carried by a cable system (or on a lower channel in instances where the "on channel" assignment was a higher number than the cable systems had channels). NCTA also made major concessions to the broadcasters concerning cable hook-ups to multiple television sets within a household.

The Community Antenna Television Association endorsed the compromise. The National Association of Public Television Stations had the matter under consideration when the issue was mooted by INTV's decision to veto it.

NCTA and NAB had agreed that broadcasters could be vested with a legal, enforceable right to be carried on the same number cable channel for which they had sought and received a license from the FCC to broadcast over the air. Additionally, broadcasters and cable operators would be able to arrange carriage on a different channel upon mutual consent. For example, a broadcaster and a cable operator could agree to keep a station where it is, rather than move it "on-channel", if that number was different. Or, a broadcaster and operator might agree to move a station to a new channel in order to cluster broadcast signals for a discount tier.

INTV, however, found this arrangement to be insufficient for their commercial interests. INTV insisted in essence that broadcasters be vested with a legal right to be carried on the channel of their choosing. Their demand that broadcasters as a class be given preferential treatment by force of law over cable networks is precisely why the courts have thrown out prior must carry rules: INTV's demand, if accepted, would violate the First Amendment rights of cable operators and cable networks.

The Court of Appeals and the Constitution cannot simply and conveniently be ignored in order to enhance and protect the revenues of some independent broadcasters. It is NCTA's goal to help craft a must carry statute that passes judicial scrutiny, not one which fails because of a constitutional infirmity that leaves us seeking to resolve the issue all over again.

C. NCTA-NAPTS Must Carry Agreement

As an illustration of NCTA's continued commitment to must carry, the National Association of Public Television Stations and the National Cable Television Association announced yesterday, on March 28, 1990, that we will jointly recommend to Congress a must-carry proposal aimed at ensuring continued carriage of local public television stations on local cable systems.

The Federal Communications Commission's most recent must carry rules required cable systems to carry at least one, but no more than two, public television stations, based on each system's channel capacity. That rule was overturned by a federal appeals court in the 1987 Century decision. The NAPTS-NCTA legislative proposal, if enacted, would result in a federal must-carry law for local public television services.

Local cable systems and public television stations for years have been involved in mutually beneficial, cooperative ventures. It is important that this same spirit of cooperation continues at the national level. From the outset, it has been the intention of both our industries to put in place a pure and simple must carry rule. Through good-faith negotiations, we have reached a workable compromise guaranteeing that this important form of television will remain an integral part of cable's basic programming package.

The agreement between the two industry associations would expand the FCC's previous must carry rules. Cable systems would continue to carry all local non-commercial educational public television stations they currently carry. A station would be considered "local" if it is located within 50 miles of a cable system's principal headend, or if it casts a Grade-B contour over that headend.

Also, cable systems with 12 channels or fewer would be required to carry one public television station. Systems with 36 or fewer channels would have to carry up to three local services; under the previous rules, systems with 54 or fewer channels had to carry only one public television signal.

Systems with more than 36 channels would have to carry no more than three local public television services, unless the additional local public television stations contain non-duplicative programming or unless the cable systems currently carry more than three local public television services. Under the previous must carry rules, no cable system was required to carry more than two public broadcasting signals.

The agreement would also ensure that program-related material on a local public station's vertical blanking interval and subcarrier, such as descriptive video for the blind and closed captioning for the hearing impaired, would be retransmitted by cable systems.

Finally, while local public television services would be carried on a cable system's basic tier, there would be no channel positioning requirement in deference to the request of Chairman Inouye that the Federal Communications Commission be allowed to take the issue under advisement.

D. "Must Pay"

In the increasingly competitive world of television, broadcasters -- and particularly the broadcast networks — are anxiously seeking new sources of revenue. The broadcasting industry has recently embraced a proposal that would require cable systems to both carry local TV stations and pay them for the privilege of doing so. A figure often cited as "appropriate" is twenty percent of a cable operator's basic revenues.

According to the broadcasters' new theory, which contradicts the stand they have taken on must carry for 30 years, Congress should compel cable operators to share fees gained from providing a local TV "antenna service" to cable subscribers. The broadcasters do not claim that cable operators are retransmitting local TV signals to households which the local TV station is not licensed -- indeed obligated — to serve. Nor do the broadcasters deny that in many instances, the cable "antenna service" adds value to the signal by providing a better picture. Rather, they characterize the cable company's local antenna service as expropriating private property without payment.

It is ironic that after three decades of demanding that cable systems be required to carry local TV stations' signals, the broadcasters should suddenly characterize cable's local antenna function as thievery. Indeed, the committee staff draft's own findings point to the fact that "A cable television station which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator."[9]

Imposition of a twenty percent tax on basic cable revenues for the benefit of broadcasters would have a major effect on the economics of the cable business and basic subscriber fees. No business in the United States could absorb a new twenty percent tax without raising prices, and the cable industry is no different. At a time when this Committee continues to express concern about cable rates, there should be no mistaking the fact that if the broadcasters' "must pay" plan is enacted, cable rates will rise sharply.

From the cable industry's perspective, the policy issue here involves two questions:

(1) Should a television consumer be required to pay, even indirectly, a TV station because he uses a community antenna system — instead of rabbit ears — to receive a signal which the station is obligated by its license to provide over-the-air for free? Put another way, how does the local TV station suffer from the presence of an antenna service provider who makes up for deficiencies in the TV station's own over-the-air transmission technology?

---

[9] Section 2(13); page 5.

(2) Given the long history of broadcast industry support for mandatory cable carriage of local TV stations, and given the usage patterns that have evolved as a result of "must carry" policies, is it fair for the broadcast industry suddenly to turn around and demand payment for continuation of a well established practice which they themselves fostered?

The key to this issue has more to do with consumer cost and convenience than with arguments over which industry should get the money. It is unlikely as a legal matter that the First Amendment will tolerate both mandatory carriage rules and mandatory payment for the privilege of complying with them. More likely, the result of a "must pay" law would be a decision by cable systems to discontinue carriage of local TV signals. Signal carriage practices would vary widely from market to market, according to the popularity and number of TV stations in each area. Many cable operators, reluctant to raise rates in order to pay the new 20 percent tax, would find it cheaper to provide subscribers with a mechanical "A/B" switch, allowing the subscriber to switch back and forth between the cable feed and a roof-top or rabbit-ears antenna. Under this scenario, however, the subscriber would lose the picture-improvement feature of the cable antenna service. In addition, all but a handful of hand-held remote control units now in use would be rendered partially or altogether ineffective. Predictably, consumers would be puzzled, and many angered, by the "switched signals."

The question is whether the broadcasters' new claims have sufficient merit to justify a regulatory experiment that might result in the fragmentation of the consumer's system of television reception. Moreover, if the law were to mandate that a portion of cable subscriber fees should be passed through to the broadcasters, could the broadcasters continue to characterize their signal as "free" TV? What would the policy implications be of broadcasters taking on the financial attributes of a cable (i.e. subscription) network? Should the cable operator gain the right to insert his own ads into the CBS signal, as he does on a made-for-cable channel?

Undoubtedly, many broadcasters in the conventional television industry have been hit hard in recent years by rising program costs and stagnant advertising revenues. At the same time, increased competition from cable networks, video cassette rentals, and new independent TV stations have eroded the audience share which CBS, NBC and ABC used to take for granted. But these adverse developments to the networks' balance sheets do not justify wholesale rearrangement of a TV delivery system deeply ingrained in consumer expectations and habits — a system which the networks labored hard to create. Networks should decide, forthrightly, either to become cable channels or to look elsewhere for solutions to their financial problems.

E. Summary

NCTA believes that, once again, the record is clear: the cable industry is prepared to agree to legislation that would reinstate must carry requirements — and indeed, has agreed to provisions that go beyond the most recent inter-industry agreement. We have made every good faith effort possible to resolve this issue. Yet the commercial broadcasters' response has been to continually up the ante.

IV. THE BENEFITS OF DEREGULATION

As NCTA suggested in Section II above, rate increases since deregulation cannot be looked at in isolation. The Cable Act provided two factors necessary for cable operators to take a longterm view of their business: regulatory stability and the ability to price and package services independently. In return for this flexibility, cable operators were expected to make major financial investments, which they have.

A. Investment In Programming

Since deregulation, the cable industry has committed millions of dollars to improve the quality and diversity of programming available on American television. For example, cable operators' investments in basic cable programming jumped from about $300 million in 1984, when the Cable Act was passed, to nearly $1 billion in 1989. Deregulation has fostered the creation of 22 new programming services, with another 30 under development.

Similarly, overall spending on programming by both basic cable networks and premium services like HBO, Showtime, and Disney, has almost doubled from $1 billion in 1984 to $2 billion in 1989.[10] These investments also were made possible by the Cable Act, which assured program networks that there would be a stable regulatory environment in which they could recover the extensive outlays needed to develop new and innovative television programming.

B. Investment In Plant And Equipment

Since rates were deregulated, operators have also substantially increased their investments in upgrading plant and equipment. Spending for this purpose increased from about $200 million in 1984 to over $500 million in 1989. These investments have benefitted consumers by increasing the number of channels available and improving both picture quality and reliability. Moreover, suppliers to the cable television industry have undertaken research and development on high definition television, fiber optics, and digital cable radio services. They have developed and produced new generations of amplifiers, fiber optic transmission systems, and addressable equipment.

---

[10] Paul Kagan Associates, Cable TV Programming, August 31, 1989, p. 2; The Pay TV Newsletter, July 31, 1989, p. 2.

In 1984, 57% of the nation's cable customers had access to 30 or more channels.[11] Today that figure has risen to 87% of our customers and is still climbing.[12] Another recent trend is toward addressable converters, a technology that can provide consumers with pay-per-view options. In 1984, only 18% of cable households had addressable converters. By the end of 1989, that number grew to an estimated 38% and is projected to rise rapidly in the years ahead.[13] This pattern of increased expenditures to upgrade and rebuild plant will continue if Congress does not choke off the incentive to invest in the cable industry.

The substantial investments by cable operators in plant and equipment since deregulation have led to more than just improvements in cable television systems: they have also created jobs and bolstered U.S. competitiveness abroad. As General Instrument Corporation noted:

---

[11] Warren Publishing, 1984 Television and Cable Factbook, No. 52, p. 1726.

[12] Warren Publishing, 1989 Television and Cable Factbook, Cable & Service Volume, No. 57, p. C-375.

[13] Paul Kagan Associates, Cable TV Technology, October 25, 1988, p. 4.

The cable industry has created increased employment for U.S. citizens. The number of U.S. jobs attributable to the cable industry has grown by 27% since deregulation, from 134,000 in 1986 to 170,000 today.

This growth is also reflected in the employment of cable's equipment suppliers where, despite the off-shore production common to all electronics industries, domestic employment for video and audio engineering, research and development, marketing and other positions has expanded. This is also true for cable's program suppliers which remain largely U.S. based. Altogether, cable's service, equipment and manufacturing suppliers today provide jobs for 68,600 people, a 21% increase over the 56,800 jobs accounted for by these suppliers in 1986.

Cable television is a U.S. industry with tremendous international growth opportunities. American television is the envy of the world. The variety of programming and the diversity of delivery systems is the result of a free, private market with minimum government intrusion. The world wants our programming, our technology and our business experience.

American companies continue to dominate the cable equipment market. American-designed technology remains superior to offshore technology. It is no accident that numerous U.S. companies are partners throughout the world in a variety of cable and satellite video delivery systems and manufacturing ventures. But the opportunities are only just emerging.

The Western European video market consists of more than 114 million TV households, of which less than 1 million have access to a pay TV service. In the United Kingdom, the cable TV authority has recently awarded 72 franchises, with U.S. participation by United Cable, Comcast Cable, Jones Intercable, U.S. West and Pactel. There are an additional 90 million TV households in Eastern Europe and the Middle East.

In the Far East, Hong Kong in 1989 awarded a cable TV franchise to a joint venture that includes U.S. West. The system will pass 1 to 1.5 million homes by 1995. No decisions have yet been made about equipment, but U.S. manufacturers will be bidding for the contracts, and are likely to win a large portion of them.

In Japan, cable TV penetration is only about 12%. In Korea, Taiwan and Australia, with nearly 20 million TV households among them, the governments are in the planning stage for cable TV. When these markets open up, U.S. equipment companies will be leading contenders, but that lead could slip way.

> Reregulation could cripple the domestic revenue base of U.S. cable equipment manufacturers. At a time when public officials are decrying America's loss of competitiveness in world markets, it is ironic that there is almost an hysteria to reregulate this highly exportable industry. The Japanese have shown us the importance of a strong domestic revenue base on which to build export markets. Reregulation of U.S. cable operators could cripple the domestic market base of U.S. equipment manufacturers and programmers, and this would sacrifice the world leadership we currently enjoy.[14]

C. Franchise Fees Paid To Local Governments

The deregulation of rates has produced indirect benefits for others, particularly city governments. Through the 1984 Cable Act, the cities sought as one of their main objectives to raise the federal ceiling for cable franchise fees and to eliminate restrictions on their use. This provision has provided substantial revenues for cities. Note that none of cable's actual competitors or would-be competitors pay a similar tax to their licensing authorities.

In 1984, prior to enactment of the Cable Act, municipalities received $200 million in franchise fees[15] and were required to devote the money to administering cable franchises. Since passage of the Cable Act, from 1985 through 1989, cable systems will have paid an estimated $3.05 billion in franchise fees.[16] That money was available for any municipal use.

---

[14] General Instrument Corporation, "Cable TV Rate Reregulation Could Stifle Technological Innovation, Reduce New Programming Development, Erode U.S. Jobs And Harm Competitiveness," March 21, 1990, pp. 3-4.

[15] Paul Kagan Associates, Cable TV Franchising, June 25, 1986, p. 4.

To put these fees paid by cable operators in perspective, cable systems paid $767.8 million to local franchising authorities in 1989, which was nearly three times more than what the cities received from the federal Urban Development Action Grants (UDAG) program in 1988.

Indeed, the $767.8 million in franchise fees represents an average of $1.22 from every cable subscriber's monthly bill.

D. Customer Satisfaction With Cable Programming

As the cable industry develops and fulfills the promise of the 1984 Act, there is little argument that customers like our programming. Perhaps the greatest evidence of cable's success in this area has been produced by our principal competition -- the broadcasters. Each year, the NAB's Television Information Office commissions the Roper Organization to survey America's attitudes toward television. 1989 was the first year the public was asked to compare cable television with network television. The result of this poll was that cable received better marks than network television for entertainment, sports, education, culture, and children's programming; cable also provided better overall programming and greater diversity than broadcast television.

---

[16] NCTA estimate based on data from Paul Kagan Associates.

1989 ROPER POLL (percentages)

	Regular TV	Cable TV	Both the Same	Do Not Know
Better entertainment programming	26	47	16	11
Better national news coverage	45	33	11	11
Better local news coverage	72	11	7	10
More educational programs	28	47	11	14
More sports programming	17	61	10	13
More cultural programming	22	51	10	16
Better quality programs overall	32	37	16	14
Better programs for children	31	39	11	20
Greater program variety overall	24	52	12	12

Cable has proven that there can be more to television than cops, robbers, and half-hour comedies. In the five years since passage of the Cable Act, more than half of America's television households subscribed to cable television. There is no better affirmation of cable's value, since people must pay for it every month: if subscribers are not satisfied with cable's programming, or if they think rates are too high, or if they do not like their operator's service, they can disconnect at any time.

The New York Times recently summarized cable's contribution to American society in an end-of-decade editorial as follows:

> At first, it seemed the most important change was the VCR ... But by the end of the 80's, it was clear that the biggest changes were coming from cable. Before cable, Manhattan residents could watch only seven channels. Cable added a few at first, then exploded. Today's Manhattanite can graze among 37 channels, and others are on the way.
>
> Because of cable, culture now travels much faster. MTV provides throbbing music day and night. There are channels for movies, channels for children, channels for talk, channels for sports. And, of course, channels for news — news that seemed to sweep through living rooms at gale force. Perhaps looking back one day, we'll recognize that changes in the reporting of news were as important as the news.
>
> Cable has made possible 24-hour news, with the power to transmit instantaneously the visual horror of Rumanian security forces firing on Rumanian citizens. And where did President Bush turn after giving the "Let's do it" order to invade Panama? He watched Cable News Network. A tree falling in an untelevised forest may or may not make a noise; when it falls before the cameras in Tiananmen Square, it echoes worldwide.[17]

IV. ANALYSIS OF THE COMMITTEE STAFF DRAFT

A. "Regulation Of Cable Rates"

1. Summary of rate regulation language

* For all systems not subject to effective competition, rate regulation is authorized for basic cable service and installation and rental of equipment necessary for receipt of all cable services.

---

[17] The New York Times, December 31, 1989, p. 10E.

- Effective competition exists where (1) a system has less than 30% penetration in the cable community or (2) the cable community is served by another multichannel video programming distributor(s) providing comparable programming at comparable rates, available to 2/3 of homes in cable community and subscribed to by at least 30% of the households.

  "Cable community" means the households in the geographic area in which a cable system provides service.

  "Available to a home" means a particular household which is actually a subscriber or which is actively and currently sought as a subscriber by a multichannel video distributor.

- Basic cable service means any service tier providing advertiser-supported programming services, or providing PEG access channels, or the retransmission of local broadcast signals.

* The FCC has 180 days from enactment to prescribe procedures, standards, requirements and guidelines to review and determine reasonableness of rates.

* In determining the reasonableness of a rate, the FCC shall, among other public interest objectives:

- Ensure that the rates to subscribers are affordable and do not reflect the inclusion of monopoly profits,

- Ensure that programmers can create new programs and services and can recover the cost of creating such new product,

- Ensure that cable operators can reasonably expand the capacity and technological capabilities of their systems, and

- Not consider the costs associated with the acquisition and sale of one or more cable systems within a three-year period.

* Local franchising authorities or a state can request that it regulate a system's rates and will be granted such right if the FCC determines the local authorities have regulations in place consistent with federal standards that provide consumers protection at least as great as the FCC's standards.

* Cable operators can petition the FCC to revoke local rate authority if the FCC finds, after comment by franchising authorities, that the franchising authority is not following federal principles.

* The current statutory automatic 5% increase for regulated rates is eliminated.

* The current statutory 180-day limit for rate increase requests (after which a rate increase is deemed granted unless there is mutual agreement on extension) is eliminated.

2. Analysis of rate regulation language

The rate regulation language in the staff draft goes beyond anything contained in S. 1880 or other cable bills pending before the Committee. Despite the fact that cable rates were below inflation in 1989, the draft would reregulate almost all of the cable systems in the United States. Moreover, it goes too far by regulating all basic cable programming, not just must carry and public access channels.

At present, the statutory definition of "basic" cable service is that tier which includes must carry and PEG channels. The draft would expand the legal definition to match the current business practice of including satellite-distributed networks such as CNN, ESPN, and Superstation TBS in a "basic" service package of approximately 20-40 channels (the average is 32 for the most popular tier; 30 for the lowest priced). The draft does this by redefining "basic" to include must carry, PEG, and cable networks supported by advertising.

The net effect of this language would be to regulate the price of virtually all satellite-distributed cable networks, no matter how they are packaged. If enacted, this approach would abruptly stop the development of new cable networks and would threaten several of those already in existence. This is because the specter of reregulation would reduce an operator's incentives to make long-term financial commitments to plant, programming, and services. Rate regulation discouraged operator investments prior to the Cable Act and would do so again if reinstated.

In addition, the staff draft goes beyond rates to regulate almost all installation, service, and repair charges; it also expands the FCC's and the cities' powers to include leased access channels. It does all of these things in such a way that makes it possible to return regulatory control of cable television to the cities, which can petition the FCC for authority to regulate cable companies as long as they meet certain "minimum" standards. What these standards are, whether cities can exceed them, and how the FCC will certify compliance are all unclear.

Moreover, the guidelines given to the FCC for creating rules to regulate rates are inconsistent with current regulatory law. For example, the draft states that rates should be "affordable" rather than "fair." Nowhere does the draft mention the essential component of rate regulation: a fair return on investment. Programmers would be entitled to recover their costs but not operators. Indeed, the proposal repeals language which guarantees operators a maximum 5% adjustment for inflation where cable systems are currently regulated by city councils.

B. "Nondiscrimination With Respect To Video Programming"

1. Summary of mandated access to programming language

- No vertically-owned video programmer may unreasonably refuse to deal with another multichannel video distributor.
- No video programmer (whether vertically owned or not) may discriminate among multichannel providers, including cable operators, as to price, terms and conditions or availability of sale of programming except:
  - they may impose reasonable, nondiscriminatory requirements for credit worthiness, service, and financial stability; and
  - price differentials are not prohibited if attributable to differences in cost in the creation, sale, delivery or transmission of programming or are made in good faith to meet the equally low price of a competitor.

2. Analysis of mandated access to programming language

The draft would make cable programming available on a non-discriminatory basis to all third-party packagers and distributors. The language is confusing since section 640(b) creates an obligation to deal which overrides section 640(a) governing vertically integrated companies.

Fundamentally, the provision is not substantiated by the record compiled by this Committee -- a record which demonstrates that cable programming is available to satellite dish owners and MMDS systems on both a package and an a-la-carte basis. For example, cable programming is available to the American public through such third-party distributors as Consumer Satellite Systems, the National Rural Telecommunications

Cooperative, The Satellite Source, Programmer's Warehouse, and American Programming Services. Cable programming is also available at the retail level at reasonable cost, with the home satellite dish subscriber often paying less than the average cable customer for the same services. In fact, Viacom's Showtime and 16 basic services are available to dish owners for $20.95 per month -- $18.75 if paid annually — while an equivalent package costs cable subscribers $25.19 a month. Dish sales have risen in both 1988 and 1989, which indicates that the market is working and that customers are finding good value in the programming available through home satellite dishes.

A key policy question for Congress is whether owners of intellectual property like cable programmers should continue to have exclusive rights to the distribution of their product. The FCC recently reaffirmed the exclusivity rights of broadcasters in its syndex proceeding, and Congress underscored the exclusive distribution rights of cable programmers and broadcasters in the Satellite Home Viewer Copyright Act of 1988. NCTA is not aware of any compelling reason for changing the principles of exclusivity which underlie our nation's copyright laws. In the absence of any such need, cable programmers should continue to have the right to distribute and market their product as economic and policy conditions warrant. They certainly should not be singled out for unusual treatment, just because their product happens to be distributed by cable or satellite, anymore than movie studios should be discriminated against, just because they sell theatrical distribution rights only to selected movie theaters.

However, the debate over program distribution and volume discounts is not just about access: it is about who gets to keep the additional margin available from distribution businesses that have lower capital and operating costs. Even if one believes that there is a legitimate problem with distribution, the object should not be to mandate a uniform wholesale price, since that would merely give the additional margin to the alternative distributor for efficiencies developed over time, and at considerable expense, by the cable operator and programmer. Rather, the object would be to ensure that the alternative distributor gets a wholesale price which allows him to compete fairly with the cable distributor at the retail level. This already occurs, as we noted above in the comparison between what home dish owners and cable subscribers pay for similar programming.

Finally, the theory behind mandating access to cable programming is flawed because it assumes that there should be only price competition, not product differentiation. It is the cable industry's investment in high quality, diverse programming that has made cable television the success that it is today. Rather than follow broadcast TV's lowest-common-denominator approach to programming, cable TV has developed specialized networks geared at specific segments and interests in the viewing population. When taken as a whole, the 30-40 basic cable networks available on most systems allow subscribers to become their own programmers, picking the shows they want to watch when they want to watch them.

Mandated access to programming, combined with rate regulation, would stifle investment in programming and halt the rapid expansion of program choices that has characterized the cable industry since deregulation. Rather than promote diverse, competing programs on American television, the draft would give allow any packager to obtain and market exactly the same product. The only difference would be price. In the short term, consumers might find a better deal from a non-cable operator who does not have to bear research, development, and marketing costs or franchise fees. However, in the long run, consumers will suffer as programs are endlessly recycled and no new networks come on line. The proposal suggests a pessimistic view of the future whereby all that there is to be seen on TV has already been invented. More importantly, it undermines the First Amendment and the primary goal of the Communications Act, which is to promote a diversity of voices and information.

If the Committee decides to deny cable exclusive rights to the distribution of its programming, then the same principle should apply to broadcasters. By arguing for "must pay," the broadcasters seem to be moving toward a theory wherein cable would become an official transmission medium for, as an example, CBS, while CBS would begin to acquire the attributes of a cable network by collecting a portion of the basic cable subscriber fee. At the same time, by supporting legislation to mandate access to cable programming, the broadcasters seem to argue that requiring more than one local distributor of a television network is inherently a good thing.

If broadcasters succeed in getting "must pay" subscriber fees from cable systems and succeed in denying local exclusivity for HBO, for example, should not cable systems get the right to become local affiliates of CBS and compete head-to-head in local markets with the CBS broadcast affiliate? If there are going to be two or more distributors for cable networks in town, why not two CBS distributors? And if the cable operator has to pay for distribution rights for the CBS signal, why should he not get to put in his own ads, as the broadcast affiliate does?

C. "Leased Commercial Access"

1. Summary of leased commercial access language

- * Adds as a purpose of the section: "to promote competition in the delivery of video programming."
- * The FCC may by rule at any time increase the statutory percentages for channels that must be set aside for commercial use. (Current law permits the FCC to promulgate "additional rules only after cable systems with 36 or more activated channels are available to 70% of U.S. households and are subscribed to by 70% of those households to which they are available.")
- * Protection for saturated systems is eliminated. Operators could be forced to drop programming to put on a commercial user.
- * The FCC is given the initial authority to establish and regulate the price, terms, and conditions for commercial use (including billing and collection by the operator) that are "just and reasonable, and nondiscriminatory." (Current law allows the operator to establish price, terms, and conditions "which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.)
- * The FCC can authorize franchising authorities to regulate in lieu of the Commission if it finds:
    - — State and local laws and regulations conform to FCC procedures, standards, requirements and guidelines, and

- the franchising authority will provide an overall level of protection for the public interest that is at least as great as the protection provided by the Commission. (Current law preempts local regulation.)

* A cable operator can petition the FCC to revoke local regulatory authority if it can demonstrate that its findings (see above) are no longer applicable.

* Procedures and standards for redress against operators by persons unreasonably denied access are eliminated. (Current law provides significant protection for operators.)

2. Analysis of the leased commercial access language

Several factors have contributed to the fact that few programmers or businesses have made use of the commercial leased access channels mandated by the Cable Act. First and foremost, there has been little demand for these channels. When Congress enacted Section 612, it anticipated that leased access channels would be attractive to cable programming networks as well as Hollywood studios, independent producers, local programmers, and anyone else wishing to market video programming directly to a cable company's customers. NCTA is aware of only a few instances in which anyone has sought to obtain a channel. The problem is not that leased access has been tried and failed; for the most part, it has never been tried. Although cable operators have made leased access channels available as required by law, they cannot dictate demand for those channels.

Second, as a general matter, cable programming networks -- like broadcast networks -- find that the local affiliate system is the most effective way to deliver their product. Cable operators, like local broadcasters, obviate the need for a programming network to establish a marketing infrastructure in each community where it seeks to distribute its product. The local affiliate model, for example, allows Turner Broadcasting System to run its cable networks, like CNN and TNT, in thousands of communities across the country from Atlanta in much the same way that ABC, CBS, and NBC control their networks from New York. Unless the projected revenues from carriage on leased access channels sufficiently surpass the cost of establishing a presence in a specific local market, there remains more incentive for program networks to pursue affiliate agreements with local cable operators than to use those commercial channels.

Finally, it is important to remember that cable operators pay the programming networks for carriage of basic services, not vice versa. The economics of a leased access arrangement would stand this relationship on its head. Such economics would be very uncertain and do not guarantee that (a) an independent programmer can generate enough local advertising revenue to cover the costs of paying for a network without separate subscriber fees; (b) have enough money left over to pay the operator for carriage on the leased access channel; and (c) still earn a profit.

D. "Limitations On Control And Utilization"

1. Summary of horizontal and vertical concentration language

* Horizontal ownership: The FCC, within one year, must establish horizontal limits for cable (ownership is defined as 5% voting or 10% equity interest).

* Vertical ownership: The FCC, within one year, must establish a limit on channel capacity used for affiliated programming. Horizontal ownership criteria do not apply and requisite cognizable interest is not specified.

2. Analysis of vertical and horizontal concentration language

The findings used in the staff draft as justification for requiring the FCC to set limits on vertical and horizontal concentration are not supported by the record. Indeed, the notion that vertical integration is necessarily harmful to the consumer or that horizontal concentration has led to anti-competitive behavior is amply disputed in the record compiled by the Committee on June 14, June 21, October 25, and November 16, 1989.

There is no trend in the cable industry to discourage competition. To the contrary, cable television has increased choices for consumers by providing a sharp increase in the number of networks available. For example, prior to the advent of cable, there were only 3 national programming networks in the United States, all on broadcast television. Cable now provides 65 national and 39 regional networks, with another 30 in the planning stage.

Despite the rhetorical claims of some of our critics, MSO investment in programming, i.e., vertical integration, has increased the breadth and depth of viewing choices available to consumers. In his study "The Competitive Consequences of Vertical Integration in the Cable Industry," which we submitted to the Committee in June of 1989, Dr. Benjamin Klein found that "cable operators are not using vertical integration to further any anticompetitive goals" (p. 2). He specifically noted that "...no individual vertically integrated MSO has the power to foreclose entry of competing cable programming networks" (p. 31) and that "vertical integration has not created a 'barrier to entry' into the cable programming industry" (p. 32). The result is that "cable consumers of vertically integrated MSOs have a wider selection of program choice among the most popular cable networks than consumers of nonvertically integrated cable systems" (p. 3).

Dr. Klein's study demonstrates that there is no evidence of a pattern of problems with unaffiliated programmers gaining access to cable systems: "vertically integrated MSOs are not using their ownership interests in cable programming as a tool to exclude competing delivery systems" (p. 3). Dr. Klein cites statistics which demonstrate that "home satellite dish owners currently have access to a wide selection of cable programming, directly from the satellite channel or from a number of competing third-party packagers, at attractive prices" (p. 4). Moreover, "most cable programming networks, including all of the top 10 and 22 of the top 28 basic and premium networks in terms of subscribership, currently are provided to MMDS systems" (ibid.). Dr. Klein concludes his discussion of vertical integration by noting that it "benefits the viewing public by expanding programming availability while posing no current or likely future threat to competition" (ibid.).

Similarly, Dr. Klein found that "no MSO, either vertically integrated or not, possesses the economic power to exclude potential competitors from program supply" (p.3). Dr. Klein noted that even TCI, which has interests in cable systems serving 23 percent of American cable subscribers, cannot control the programming on other systems, which reach 77 percent of the public (see p. 30). Moreover, Dr. Klein found that "there is no evidence that vertically integrated MSOs systematically exclude programming networks in which they do not have ownership interests. In fact, the four largest vertically integrated MSOs, TCI, ATC, Viacom and Cablevision Systems, are generally more likely than non-vertically integrated cable operators to carry the most popular cable networks in which they do not have an ownership interest" (p. 3; see also pp. 28-48).

Others have looked at vertical integration in the cable industry and reached similar conclusions. In June 1988, the National Telecommunications and Information Administration released a study, entitled "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," which found that cable's vertical integration has produced no adverse consequences. While noting that ownership affiliation does increase the probability that a premium network will be carried by affiliated systems, the analysis concluded that "carriage of affiliated services generally does not occur to the exclusion of unaffiliated services."[18]

The NTIA analysis further tested whether vertically integrated MSOs discriminate against non-affiliated basic services. Although the statistical conclusion reached by NTIA for basic networks was less strong than for pay networks, NTIA found that vertically integrated systems are not likely to discriminate against unaffiliated basic services. Based on these analyses, NTIA concluded that: "In sum, common ownership of cable systems and cable programming services does not appear to affect adversely the supply of cable programming or the diversity of viewing choices for cable subscribers."[19]

---

[18] NTIA Report 88-233, p. 102.

The Klein and NTIA studies are the only comprehensive analytical efforts which assess the impact of vertical integration in the cable industry. Both found no evidence of anticompetitive behavior, and Dr. Klein definitively documented the pro-consumer benefits of vertical integration. There is no other evidence in the Committee's record -- and no basis, aside from unsubstantiated allegations -- for the contention that vertical integration is a problem in the cable industry.

With regard to ownership of cable systems, the cable industry is not highly concentrated as measured by either the top four firm concentration ratio or the Herfindahl-Hirschman Index (HHI). A market is considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Department of Justice, and prevailing economic theory, consider this market power to exist when the four firm concentration ratio exceeds 50%, or when the HHI reaches 1,000.[20]

---

[19] Ibid.

Current data on the market share of the cable operators that own a multiple number of local cable systems (MSOs) show low levels of concentration. Applying the HHI index to the top 20 cable MSOs, the resulting HHI value of 458 falls well below the Justice Department's threshold of 1,000.[21] Thus, according to this measure of market consolidation, the cable industry is not highly concentrated.

Using the four firm concentration ratio, the conclusion is the same. According to the most recent data available, the top four cable MSOs have attained a 35 percent share of the cable market, a share far lower than the 50 percent threshold that defines a concentrated market.[22]

---

[20] U.S. Department of Justice Merger Guidelines, p. 18. Note that the HHI threshold of 1,000 is a minimum level of concentration. The maximum HHI level attainable is 10,000, which represents a pure monopoly situation (one firm with 100% of the market = 100 x 100).

[21] In its guidelines, the DOJ states that although it is desirable to include all market firms, small fringe firms do not affect the HHI significantly and are therefore not critical. Only the Top 20 MSOs were used here because beyond the 20 largest MSOs, each smaller MSO captures less than one percent of the market, and thus the square of a number less than one will have little impact on the value of the index. The top 20 MSOs serve approximately 33 million subscribers, or about 65 percent of the nation's subscribers.

[22] If all of TCI's minority interests are included in its subscriber count (which would raise TCI's total from 7,970,784 to 12,280,752), the HHI for the cable industry would be 767 and the top four firms would control 42.7% of the market.

E. "Multiple Ownership"

1. Summary of cross-ownership language

- * A cable operator may not hold an MMDS license or operate a SMATV in his community without an FCC waiver.
- * If 10% of the homes in the U.S. subscribe to video programming via satellite (C-band or Ku-band DBS), the FCC shall adopt rules to limit ownership of any such service by cable operators and to require access by unaffiliated programmers to cable-owned satellite services. (This provision triggers at 10%, regardless of cable involvement in DBS.)

2. Analysis of cross-ownership language

The desire to maintain a diversity of voices in a local market can be used to justify cross-ownership limitations on terrestrially-based, i.e. "local", distribution media, as seen in the existing telco-cable and cable-broadcast cross-ownership rules. However, the same is not necessarily true of cross-ownership restrictions between local (e.g., cable) and national (e.g., DBS) distribution media. The restrictions in the staff draft will tend to limit the use of hybrid delivery systems (e.g. DBS and cable), but will have no positive effect on local market diversity.

Moreover, if cable-DBS cross-ownership should be prohibited, why not broadcast-DBS and telco-DBS cross-ownership? Why should some companies like Fox and NBC get a warrant for cable programming while the Congress protects their programming from use by others? Cable's competitors want to go into the DBS business but do not want to use their own broadcast programming to do it. They are therefore lobbying for mandatory access to cable programming while simultaneously arguing that their affiliates should continue to have exclusive rights to network programming through syndex and network non-duplication rules. This inconsistency is unfair, unprecedented, and anti-competitive.

The net effect of the draft is to limit the cable industry, and its subscribers, to existing technologies, since cross-ownership restrictions will fence off the cable industry from new distribution systems such as Direct Broadcast Satellite (DBS).

Yet there is no record to substantiate the need for such actions. Indeed, there would appear to be substantial competition developing in the DBS market. The FCC has approved 8 applications for high power, Ku-band DBS systems; a ninth is pending. The FCC has also approved a tenth medium power Ku-band television system, K Prime, which hopes to begin operations later this year. Of these 10 DBS projects, only three involve cable operators. By far the largest, Sky Cable, is a joint venture of Rupert Murdoch's News Corporation, General Motors' Hughes Communications, GE's National Broadcasting Company, and Cablevision Systems (as a minority owner). Capitalized at over $1 billion, Sky Cable plans to offer 108 channels of television to subscribers via platter-sized Ku-band antennas by 1993. There is no evidence in the Committee's record which would justify exclusion of cable operators or programmers from this new distribution medium. Attempts to do so will limit the development of consumer choices and new technologies in the television market.

F. "Relief From Franchise Requirement"

1. Summary of video dialtone language

* Neither a telephone company or a lessee of channel capacity on telephone facilities would be required to have a franchise if:

- the public switched network of the telephone company has the capability to transmit video; and
- the telephone company has no editorial control over, ownership interest in, or other involvement in the content of the video programming; and
- the capability to transmit video directly to subscribers is offered to subscribers on a regulated common carrier basis, including nondiscriminatory access.

2. Analysis of video dialtone language

If a telephone company builds video capability into its switched public network, the draft would allow the telephone company to lease capacity on its plant, as a common carrier, to cable programmers without either the telco or the programmer having to obtain a cable franchise or pay franchise fees. However, all existing franchise requirements would be left in place for cable operators. This dual standard is inherently unfair.

The proposal also mandates that other retailers of cable programming, e.g. a lessee on telco facilities, shall have mandatory access to cable networks and shall be given the same wholesale prices, terms, and conditions as a cable operator. Moreover, the distributor seeking access to cable programming has a right not only to the product but also the programmer's distribution system. There is no basis for giving third parties a federal warrant for intellectual property just because it happens to be cable programming carried on a satellite.

Taken together, video dialtone and mandatory access to cable programming would result in a situation where one retailer, the cable operator, has to compete while carrying a heavy burden of direct regulatory costs, while the telco lessee would be entirely free of such costs.

The average cable operator must contribute between 10% and 20% of his gross revenues to the local government as a result of franchise obligations contained in the Cable Act. For example, in Montgomery County, Maryland, the cable operator gives 14% of his gross revenue to the county — in cash, off the top — as a result of franchise fees, PEG access support, and taxes; this does not count the costs of free access channels and institutional networks. None of these obligations would be borne by a telco lessee.

Under existing law, telephone companies can already build, maintain, and lease cable systems to others — just as they have done in Washington D.C., for example. Non-Bell Operating Companies also have the effective ability to build cable systems in local service areas with fewer than 30 homes per mile. The FCC has granted a total of 387 applications for telephone companies to provide video services in rural areas since 1970 while denying only 5 (all before the Cable Act was passed in 1984).

The Congress and the FCC have historically supported a clear separation of content and conduit in the telephone industry. The staff draft recognizes this important principle and does not propose to allow telephone companies into programming. Unfortunately, it places different burdens on two competitors and relieves telephone companies — and, more importantly, independent packagers leasing telco facilities -- from the costs and obligations of obtaining local franchises. The net effect is to create, through federal intervention, a skewed regulatory environment in which the cable industry is put at a competitive disadvantage. This treatment is inequitable and has no basis in law, the record, or American business practice.

G. "Evidentiary Standard For Review Of Decision To Deny Franchise Renewal"

1. Summary of the franchise renewal language

* A court could only grant relief from a renewal denial if the decision is not supported by substantial evidence. (Current law allows relief if denial is not supported by a preponderance of the evidence.)

2. Analysis of the franchise renewal language

The proposal to change the evidentiary standard in contested franchise renewals from "preponderance" to "substantial" is unexpected and unwarranted for three reasons:

a. There is no record for this particular idea. Current law provides sufficient protection for cities and indeed, courts have usually upheld them in the few cases where cities have denied an operator renewal and the operator sued.

Where there has been discussion in the record of strengthening the hand of cities at the time of refranchising, the real issue has been revoking the franchise of a bad operator, not processing a renewal. NCTA is ready to discuss the revocation issue with the committee but is not prepared to undermine a fundamental tenet of American business, i.e., that companies are ongoing concerns which can plan, invest, and serve their communities over the long-term. By changing the standard of judicial review, the draft gives cities almost unlimited power to deny existing cable operators franchise renewal regardless of the weight of the evidence — and appeals courts will be forced to uphold these decisions. This will create a perverse incentive for operators to recoup all of their investments within the life of a single franchise. The proposal would thus reduce incentives for operators to invest in the long-term.

b. The proposed change would apply a lenient and unwarranted standard of judicial review to city councils in their decisions about cable franchise renewals by granting them a deference normally reserved for quasi-judicial bodies like the FCC. City councils are not independent, quasi-judicial bodies and our nation's courts should retain the power to independently evaluate the record in franchise renewal decisions. The change from "preponderance" to "substantial" would subject operators, programmers, and consumers alike to the abuses that existed before passage of the 1984 Cable Act.

c. The proposed change paradoxically reinforces the single franchise system. It assumes there should be only one cable system per jurisdiction, and that in order to give a franchise to a second operator, the existing operator must first be put out of business. An alternative would be to grant a second franchise and let market forces test whether the first operator is truly non-competitive or out-of-touch with his local community.

There is nothing wrong with the Cable Act's current franchise renewal provisions. They were enacted in 1984 with the specific approval of the National League of Cities and the U.S. Conference of Mayors, and are based on the principle that a serious, objective case should be made before putting someone out of business. Indeed, the Cable Act reaffirmed the cities' right to grant franchises and set forth standards by which cable companies would be judged when they applied for renewal or new franchises.

Under the Cable Act, cities and other franchising authorities have the power to determine:

(1) the terms and conditions for public, educational, and governmental access channels on cable systems;

(2) how many franchises will be awarded;

(3) franchise fees up to 5 percent of a cable company's gross revenues;

(4) how these franchise fees will be spent;

(5) requirements for a cable system's facilities, equipment, and channel capacity at the time of renewal or initial construction if new;

(6) customer service obligations and construction schedules; and

(7) basic cable rates where the FCC determines that there is no effective competition from other video services.

The Act also imposes obligations for subscriber privacy and equal employment opportunity on all cable systems. Finally, it ensures that operators whose rates are deregulated are not immune from Equal Employment Opportunity and other non-discrimination obligations (s. 623(f)).

With regard to refranchising, the Cable Act establishes clear standards for reviewing an operator's application for renewal. It also guarantees public review of a community's future cable-related needs and the performance of cable operators under existing franchise agreements by establishing guidelines for:

(1) the submission of proposals for renewal;

(2) adequate and prompt public notice;

(3) public hearings;

(4) timely action on the proposal (within 4 months);

(5) full and fair participation by all interested parties, including the right of cable operators to introduce evidence and compel the production of evidence;

(6) written transcripts and written decisions; and

(7) appeals to the court for relief in the event that a city does not follow the Act's renewal procedures or if its decision is not supported by a preponderance of the evidence in the written record.

Under the Act, a city's decision to deny an application for renewal has to be based on an adverse finding with regard to one of the following:

(1) the operator's compliance with the material terms of the existing franchise and/or applicable law;

(2) the quality of an operator's service, including signal quality, response to consumer complaints, and billing practices;

(3) the operator's financial, legal, and technical ability to provide the services, facilities, and equipment set forth in the proposal; and

(4) the reasonableness of an operator's proposal in meeting cable-related community needs and interests, given the cost of meeting such needs and interests.

In this regard, the Cable Act has worked well to protect the interests of cities, consumers, and cable operators alike. Section 626(c)1(A) in particular, which allows cities to judge cable companies on their compliance with the terms of existing franchises as well as existing law, already covers employment practices, consumer protection, subscriber privacy, obscene programming, and other policy concerns. Since 1984, there have been only half a dozen contested renewal proceedings, and the cities have won all of these. The current law works as intended and should be preserved.

H. "Requirement For Certain Equipment On Television Sets"

1. Summary of the electronic A/B/C... switch language

- The FCC is given authority to require television set manufacturers or sellers to equip sets with "an electronic switch permitting users of the apparatus to change readily among all video distribution media" if the FCC determines installation of the switch is technically and economically feasible.

2. Analysis of the electronic A/B/C... switch language

There is no record for the recommendation that the FCC consider mandating A/B/C... switches. Indeed, section 2(16) of the draft's findings conclude that "a governmental mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the "A/B" input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest." It is therefore unclear why the proposal should ask the FCC to pursue this issue, especially since it will involve increased costs to the consumer should the FCC require TV manufacturers to install such electronic switches.

NCTA does not have major substantive problems with mandating electronic switches in television sets. In fact, the cable industry would probably welcome electronic A/B/C... switches if the broadcast industry pursues its must pay proposal -- a concept which FCC Chairman Al Sikes has labelled "wrong-headed." Should Congress link must carry to compulsory license, or should it require payment for broadcast signals, it would provide an incentive for cable operators to devote all of their channel capacity to cable networks, leased access, and PEG channels while letting consumers receive broadcast signals from one of the antenna ports on their electronically-switched TV sets of the future.

I. "Limitations On Franchising Authority Liability"

1. Summary of liability language

* Franchising authorities, the FCC, and other governmental entities would be protected from monetary damages (authorized by the Civil Rights Act as restitution for constitutional violations) from any claim asserting violation of First Amendment rights arising from any actions taken under the Cable Act.

2. Analysis of liability language

This provision appears to respond to the fears of some cities that they may be sued for denying a franchise. A few years ago litigation was brought in federal court in California whereby an applicant for a cable franchise sued the city for monetary damages under the Civil Rights Act because his application was denied. No court has ever ordered a city to pay such damages.

Nevertheless, NCTA is sympathetic to the problem of franchising authorities in their potential vulnerability for monetary damages based upon violations of civil rights. NCTA recognizes that the appeals courts and the

Supreme Court are still in the process of defining the parameters of cable's First Amendment protections. Although NCTA believes that cities must remain subject to injunctive relief, it does not believe that franchising authorities should be liable for monetary damages or actions that are expressly authorized by the Cable Act and that are not now a clear violation of the First Amendment.

The provisions in the staff draft, however, go too far. They would immunize a franchising authority from monetary damages even when it knowingly violates First Amendment protections. This insulation from monetary damages is an invitation to direct and egregious censorship by city councils. The civil rights of cable operators and programmers deserve no less protection than the civil rights of anyone else in our society.

J. "Minimum Technical Standards"

1. Summary of minimum technical standards language

* The FCC is compelled to establish minimum technical standards for all classes of signals on a cable system.

* Local authorities may enforce the FCC standards through its franchise or establish tougher standards.

* Local authorities may petition the FCC for an order compelling compliance "to meet the technical standards requirement of a franchise" whether the FCC's standards or otherwise.

2. Analysis of minimum technical standards language

There is nothing in the Committee's record to warrant a change in the current law regarding technical standards. By allowing cities latitude to set their own equipment and transmission standards, the staff draft would broaden reregulation of cable systems by cities and promote technological inefficiency — something the United States can ill afford in a time of increasing global competition and rising trade deficits.

Prior to 1974, cities were free to establish their own technical standards. However, in 1974, the FCC found it necessary to preempt the cities' ability to set standards for cable transmissions, although it allowed cities to enforce the standards set by the Commission. The FCC had developed substantial expertise in this area and found that the cities lacked comparable expertise. The cities' standards set were by and large unrealistic, unaffordable, and unnecessary; they were stifling the development of cable by Balkanizing the industry. Preemption was the only solution to allowing cable to develop in an orderly fashion as a national distribution medium.

The Cable Communications Policy Act of 1984 expressly reserved authority for the FCC to continue to preempt local control of cable transmissions. The FCC in 1985, after full participation of city organizations, the cable industry, and other interested parties, reaffirmed its 1974 decision to preempt.

The National League of Cites, New York City, and others appealed the FCC's ruling to the Court of Appeals for the D.C. Circuit. The Court upheld the FCC's action and was affirmed by the Supreme Court. The Court of Appeals also remanded the rules to the Commission and suggested that it develop its standards further.

The FCC rules identify four classes of cable transmissions: retransmission of broadcast signals, retransmission of satellite-delivered signals, local origination by the operator, and two-way transmissions. Although preemption applies to all classes, the Commission has actually established quantitative standards only for the first class. The Commission currently has an on-going proceeding that may develop additional standards. NCTA has been working with the National League of Cities, the U.S. Conference of Mayors and others in an effort to reach agreement on appropriate federal standards.

In assessing the proposal to reverse federal preemption over local technical standards, it is important to bear in mind that there are two main forms of television delivery in virtually every community in America: over-the-air broadcast and cable. The idea of giving local city councils control over broadcast transmissions is virtually unthinkable and a proposal to do so would have little, if any, support. NCTA believes that cable should be treated no differently and is opposed to this provision.

K. "Requirement To Carry Local Broadcast Signals"

1. Summary of the must carry language

* Codifies post-*Quincy* FCC rules, with the following major changes:
- must carry is tied to the compulsory license;
- the maximum set-aside of channels is raised to 33%;
- viewership standards are eliminated;
- no leapfrogging of network signals is allowed;
- there is no provision for A/B switches;
- there is no sunset provision;
- channel positioning:
  pre-*Quincy* channel or on-channel, at broadcaster's election; or other channel by mutual agreement;
  Franchising authority resolves disputes;
  30 days prior written notice provided to station, franchising authority, and subscribers before repositioning or deletion.;
  No repositioning or deletion during sweeps periods;
- Second sets:
  Must carry signals must be viewable on all sets hooked up by the operator. If the subscriber makes the hook up, the operator must notify him of all stations within 50 miles of the headend that he needs a converter to receive and must offer to sell or lease a converter.

2. Analysis of the must carry language

As noted in section III, NCTA supports legislation that would codify must carry requirements. However, NCTA cannot support the must carry provisions in the draft. The proposal would condition the use of the compulsory license as granted to the cable industry under copyright law (17 U.S.C. 111) on compliance with requirements to carry certain broadcast stations on certain channels. The legislation would regulate the commercial relationships between broadcasters and cable in carrying these signals and between cable and its customers in providing the broadcast signals.

On October 25, 1989, the Committee received extensive testimony from NCTA and the broadcasters on must carry, which is now part of the public record. Significantly, the staff draft goes far beyond the demands which broadcasters made at the hearing for a new must carry law. Among other things, the draft expands the number of channels to be set aside for carriage of local broadcast stations and abandons the audience share test necessary to qualify for carriage. Both of these issues are central to any must carry compromise and represent areas where the broadcast and cable industries have already reached general agreement.

Indeed, the proposal's must carry provisions favor broadcasters to such an extent and to the direct detriment of cable networks' First Amendment rights that NCTA believes the courts would find them unconstitutional for the same reasons they have twice invalidated the FCC's must carry rules.

VI. CONCLUSION: AN ISSUE OF EQUITY

At issue before the Committee today and in the weeks ahead is the future of cable television in America. Our common goal is to create a regulatory environment that will afford cable operators and programmers stability and a reasonable return on their investments while ensuring the consumer good service, reasonable prices, and a wide array of high quality programming.

Toward this end, the staff draft suggests a broad range of topics that might be included in cable legislation. Some of these topics have been covered extensively in hearings; others are relatively new or unexplored; a number go beyond the notion that some fine tuning of the Cable Act is needed. Indeed, the draft proposes a sweeping scheme of reregulation which would reregulate virtually all cable rates and expand the cities' powers to regulate service, leased access channels, and technical standards. At the same time, it would give them broad new power to deny franchise renewals and avoid monetary damages for civil rights violations. In sum, it would reregulate almost all U.S. cable systems and set rates for all non-premium cable services.

The proposal also raises the risk that unintended consequences will result. For example, the draft could have the effect of mandating what programming must be carried on approximately one half of a cable operator's channel capacity. In the case of a 36-channel system, the proposal would require 11 must carry channels and 4 leased access channels, for a total of 15 governmentally designated channels. Add to these an average of 4 commercially necessary pay channels, such as HBO, Showtime, and Disney, as well as the 2 or more PEG channels which most cities require of cable franchisees, and the number of pre-determined channels increases to 21. This would leave only 15 channels for C-SPAN, ESPN, Nickelodeon, BET, and other networks which people seek in subscribing to cable — thereby reducing consumer choice. Sixty nationally distributed basic cable networks would have to compete for 15 slots on an average 36-channel system. Granted, there would not be room for all 60 under current circumstances, but is not governmental designation of half a system's channel capacity unnecessary and counterproductive intervention? Does this not circumscribe the First Amendment rights of both cable programmers and operators? On what basis, in the record or otherwise, should broadcasters get 11 channels when twice before, in 1986 and 1989, they agreed to 9?

Several of the themes introduced in the staff draft are inconsistent and work at cross purposes with existing communications policy. For example, the draft:

* Identifies cable as a dominant medium while denying it a minimum rate of return. In addition to subjecting cable rates and services to a wide array of constraints, it places the cable industry at a competitive disadvantage by jumpstarting telco and broadcast competition while affording cable none of the protections normally given to a regulated industry. e.g. exclusive rights to operate in a service area or equal regulatory burdens for all industries — cable, telco, and broadcast alike.

* Denies the cable industry exclusive rights to distribute its own programming while protecting the same rights for broadcasters.

* Unfairly constrains the cable industry's First Amendment rights in such areas as channel positioning, leased access, and protecting cities in perpetuity from monetary damages for civil rights infractions.

* Regulates both cable programming and its underlying satellite distribution systems -- an action without precedent in the history of U.S. copyright law or business practice. It gives the cable industry's competitors a warrant for all cable programming and will clog the courts with lawsuits over what constitutes "unreasonable" refusal to deal with other distributors and what "reasonable" price differentials in the sale of cable programming might be.

The draft's negative consequences are especially severe when several different provisions of the bill are taken together, such as mandatory access to cable programming and relief from franchise requirements for cable's competitors, or must carry and leased access and current PEG channel set-aside requirements.

Finally, some topics for discussion identified at the hearings were not developed in the proposal, e.g., anti-trafficking restrictions, limits on foreign ownership, and the revocation of franchises. With regard to anti-trafficking, NCTA agrees with this Committee's longstanding concern that broadcast licenses and cable franchises be treated as public trusts, not commodities. The record and NCTA would support anti-trafficking rules; indeed, these could be extended to all mass media industries.

NCTA looks forward to working with this Committee to identify both general topics and specific language that could be developed into meaningful legislation. Several members of this Committee have clearly stated their interest in modifying the Cable Act, and NCTA will work with you toward that end.

Senator INOUYE. Thank you Mr. Mooney. May I now recognize Mr. Hostetter.

STATEMENT OF AMOS HOSTETTER, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, CONTINENTAL CABLEVISION, INC.

Mr. HOSTETTER. Mr. Chairman, members of the committee, I, along with Mr. Mooney, have submitted a fuller text which I would hope can be submitted into the record.

My name is Amos P. Hostetter, Jr. I am Chairman and Chief Executive Officer of Continental Cablevision, the Nation's fourth largest cable television company.

The company was founded in 1963 by myself and a college classmate and our company in the intervening 26 years has grown to serve 2.5 million customers or roughly one of out every 20 cable subscribers in America.

Since deregulation, Continental's customers have experienced an annual increase of approximately 4.8 percent per year in their total cable bill. I emphasize the word total because most cable customers take more than just basic service, and while basic rates have risen, prices for pay channels and other options have generally remained the same or have decreased.

This is true, not just for Continental, but for the industry as a whole. Often overlooked is the fact that rate deregulation has enabled us to make substantial investments in new plant and equipment, in programming and in customer service.

Since 1984, our company alone has spent more than a $500 million upgrading channel capacity, building fiber optic networks, installing addressable technology, replacing telephone and data processing systems and constructing new customer service and training facilities.

And while our rates have gone up less than 5 percent a year, our operating expenses per subscriber have increased nearly 7 percent a year. These increases reflect the cost of the six to eight basic channel services which we have added to most of our systems, expanded office hours, and more and better trained customer service personnel to serve our subscribers.

I urge you to seriously consider the effects regulation would have on our ability to continue to make new investments such as these.

The staff draft would impose regulation not just on basic rates, that is, those tiers which include broadcast signals, but on all advertiser-supported satellite services. It is difficult for me to grasp the notion that MTV, Movietime and the Comedy channel have somehow achieved the status of public necessities.

As I am sure Mr. Burchill will describe in his testimony, I believe rate regulation of such satellite services will strongly discourage the development of new programming services.

If the public policy objective is to assure that all Americans can receive all local broadcasts, and public, educational and government access channels at a reasonable rate, there certainly must be a less disruptive approach.

Let me turn quickly to one other topic. Since the early 1970s the cable industry has been encouraged by Congress and the FCC to develop its own sources of programming. Having now invested hundreds of millions of dollars in new and innovative programming, and having, I believe, succeeded in bringing significant diversity to the video marketplace, it now has been suggested that that programming should be made available to all of our competitors.

This proposal goes far beyond ensuring that rural America has access to cable programming—which, incidently, I support. For instance, cable programming would have to be made available to Sky Channel, a recently announced DBS joint venture between General Motors, NBC/General Electric, Rupert Murdock's News Corporation and Cablevision systems.

It is hard for me to fathom why Rupert Murdoc, General Motors or NBC, need a government subsidy to get started in any business. Are you aware that in 1988 the Sky Cable companies had combined revenues of $180 billion, 12 times those of the entire cable industry?

If the objective here is diversity of programming, it seems to me that they would do well to start some of their own services.

Programming exclusivity is not a new concept. Commercial broadcasting represents the very essence of exclusivity. You will not see NBC programming on CBS, nor for that matter will you see cable operators enlisted as local NBC affiliates.

Ironically though, mandatory access would require cable programmers to offer their product to NBC and its Sky Cable partners.

Mr. Chairman, I hope that there will be an opportunity to work with you and your committee and your staff to fashion legislation that addresses consumer problems without reducing our ability to compete in the video marketplace and deliver quality, diverse services to our customers.

Thank you.

[The statement follows.]

STATEMENT OF

AMOS B. HOSTETTER, JR.

CHAIRMAN AND CHIEF EXECUTIVE OFFICER

CONTINENTAL CABLEVISION, INC.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, GOOD AFTERNOON AND THANK YOU FOR THIS OPPORTUNITY TO SHARE MY VIEWS WITH YOU. MY NAME IS AMOS B. HOSTETTER, JR. AND I AM CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF CONTINENTAL CABLEVISION, INC., THE 4TH LARGEST MSO IN THE UNITED STATES. OUR COMPANY SERVES MORE THAN 2.5 MILLION CUSTOMERS IN 600 COMMUNITIES IN 16 STATES OR ROUGHLY ONE OUT OF EVERY 20 CABLE HOUSEHOLDS IN AMERICA. SINCE STARTING CONTINENTAL 27 YEARS AGO, I HAVE DEVOTED MY FULL ENERGIES TO OUR BUSINESS AND HAVE THEREFORE WITNESSED FIRSTHAND THE EFFECTS OF CABLE REGULATION AND CABLE DEREGULATION.

CABLE RATES SINCE DEREGULATION

AS ANTICIPATED BY CONGRESS IN 1984, CABLE RATES HAVE GONE UP FOLLOWING YEARS OF LOCAL REGULATION. WHILE IN SOME INSTANCES INCREASES HAVE BEEN EXCESSIVE, OVERALL OUR INDUSTRY HAS TREATED CONSUMERS FAIRLY. MOREOVER, DEREGULATION HAS SPURRED SUBSTANTIAL INVESTMENT IN PROGRAMMING, TECHNOLOGY AND CUSTOMER SERVICE, ALL RESULTING IN CONSUMER BENEFITS.

DURING THE FIRST THREE YEARS OF DEREGULATION, CONTINENTAL'S CUSTOMERS EXPERIENCED ANNUAL INCREASES OF APPROXIMATELY 4.8% IN THEIR TOTAL MONTHLY CABLE BILLS. I EMPHASIZE THE WORD TOTAL BECAUSE MOST CABLE CUSTOMERS TAKE MORE THAN JUST THE BASIC TIER. AND WHILE BASIC RATES HAVE RISEN, PRICES FOR PAY TV CHANNELS AND OTHER OPTIONS HAVE REMAINED AT PRE-CABLE ACT LEVELS OR HAVE DECREASED.

ALTHOUGH LARGE PERCENTAGE BASIC INCREASES IN SOME SYSTEMS HAVE GENERATED HEADLINES, THE AUGUST, 1989 GAO REPORT SHOWED THAT OVERALL CABLE PRICES WENT UP 7.9% IN 1987 AND 6.0% IN 1988. AND ACCORDING TO THE BUREAU OF LABOR STATISTICS, CABLE PRICES INCREASED ONLY 3.8% IN 1989. TO PUT THESE PERCENTAGES IN PERSPECTIVE, FROM 1987 THROUGH 1989, TOTAL MONTHLY CABLE BILLS INCREASED FROM APPROXIMATELY $21.58 TO APPROXIMATELY $25.62, OR ABOUT $4.00. A $4.00 INCREASE OVER A THREE YEAR PERIOD DOES NOT SUGGEST THAT CONSUMERS HAVE BEEN TREATED UNFAIRLY.

DEREGULATION HAS LED TO INCREASED INVESTMENT

THE FOCUS OF THE CABLE DEBATE HAS BEEN ON BASIC RATES BUT THE UNTOLD STORY OF DEREGULATION IS THAT THERE HAS BEEN SUBSTANTIAL NEW INVESTMENT IN PLANT AND EQUIPMENT, IN PROGRAMMING AND IN CUSTOMER SERVICE. SINCE 1984, OUR COMPANY ALONE HAS SPENT MORE THAN HALF A BILLION DOLLARS IN CAPITAL ADDITIONS, EXCLUSIVE OF THE COST OF SYSTEM ACQUISITIONS. OUR $100 MILLION/YEAR CAPITAL INVESTMENT HAS GONE INTO UPGRADING CHANNEL CAPACITY, REBUILDING SYSTEMS WITH FIBER OPTICS, DEPLOYING ADDRESSABLE TECHNOLOGY, REPLACING TELEPHONE AND DATA PROCESSING SYSTEMS, AND CONSTRUCTING NEW CUSTOMER SERVICE AND TRAINING FACILITIES.

PROGRAMMING BENEFITS

AS I INDICATED A MOMENT AGO, CONTINENTAL'S CUSTOMERS BILLS HAVE GONE UP LESS THAN 5% A YEAR SINCE DEREGULATION.

DURING THE SAME TIME PERIOD, HOWEVER, OUR OPERATING EXPENSES PER SUBSCRIBER HAVE INCREASED NEARLY 7% A YEAR. THE MOST VISIBLE **DEMONSTRATION OF** EXPENSE INCREASES IS THE 6 TO 8 NEW BASIC **SERVICES WHICH** WE'VE ADDED TO MOST OF OUR SYSTEMS. SERVICES LIKE DISCOVERY, TNT, AND CNBC WHICH DID NOT EXIST FIVE YEARS AGO, ARE NOW CARRIED ON MANY OF OUR SYSTEMS. FEE INCREASES FOR OTHER BASIC CHANNELS, ESPECIALLY THOSE WHICH, CARRY SPORTS PROGRAMMING, HAVE ALSO ADDED TO OUR OPERATING EXPENSES.

CUSTOMER SERVICE BENEFITS

PROGRAMMING INCREASES ARE EASY TO QUANTIFY, BUT EVEN MORE SIGNIFICANT INCREASES HAVE OCCURRED IN THE AREA OF SALARIES AND BENEFITS WHICH CONSTITUTES APPROXIMATELY 45% OF OUR OPERATING EXPENSES. IN ORDER TO IMPROVE CUSTOMER SERVICE, WE HAVE EXTENDED OFFICE HOURS TO 6 DAYS/WEEK AND SERVICE HOURS TO 15/HOURS/DAY, 7/DAYS/WEEK IN MANY OF OUR SYSTEMS. NOT ONLY HAVE WE HIRED MORE PERSONNEL BUT WE HAVE RAISED SALARIES AND IMPROVED BENEFITS IN ORDER TO RETAIN TALENTED EMPLOYEES AND ATTRACT NEW ONES. TO FURTHER STRENGTHEN OUR CUSTOMER SERVICE CAPABILITIES WE HAVE ALSO MADE A MAJOR INVESTMENT IN EMPLOYEE TRAINING. SINCE 1984 WE HAVE BUILT MODERN TRAINING FACILITIES IN MANY OF OUR OPERATING REGIONS. THIS YEAR WE WILL SPEND NEARLY $2,000 PER EMPLOYEE ON TRAINING.

BECAUSE OUR RATES ARE INFLUENCED SO MUCH BY OUR EXPENSES, IT IS TROUBLING THAT NEITHER THE GAO, IN ITS RATE STUDY, NOR THE

FCC, IN ITS CURRENT NOTICE OF INQUIRY, ARE TAKING A HARD LOOK AT CABLE INDUSTRY EXPENSES. YET, HOW CAN JUDGMENTS ABOUT THE EFFECTS OF CABLE DEREGULATION REASONABLY BE MADE WITHOUT EXAMINING CAPITAL EXPENDITURES AND OPERATING EXPENSES?

REREGULATION WOULD DISCOURAGE NEW INVESTMENT

AS YOUR COMMITTEE TAKES UP THE VARIOUS LEGISLATIVE PROPOSALS BEFORE YOU I HOPE YOU WILL CONSIDER THE EFFECTS EXCESSIVE REGULATION COULD HAVE ON OUR INDUSTRY'S ABILITY TO CONTINUE TO INVEST IN PROGRAMMING, PLANT, NEW TECHNOLOGY AND CUSTOMER SERVICE.

ONE OF THE THE STATED PURPOSES OF THE "STAFF DRAFT" IS TO "ENSURE THAT CABLE OPERATORS CONTINUE TO EXPAND...THEIR CAPACITY AND THE PROGRAMS OFFERED OVER THEIR CABLE SYSTEMS." I THINK WE'D ALL AGREE THAT THAT IS A KEY OBJECTIVE.

THE "STAFF DRAFT" WOULD IMPOSE REGULATION ON NOT JUST BASIC RATES, THAT IS, THOSE TIERS WHICH INCLUDE BROADCAST SIGNALS, BUT ON ALL ADVERTISER SUPPORTED SATELLITE SERVICES. THE NOTION THAT "MTV," "THE COMEDY CHANNEL" OR "TNT" WOULD EFFECTIVELY BE DEEMED PUBLIC NECESSITIES IS ONE THAT I HAVE A VERY DIFFICULT TIME WITH. PUTTING THAT PROBLEM ASIDE FOR THE MOMENT, I MUST TELL YOU THAT RATE REGULATION OF SATELLITE SERVICES WILL STRONGLY DISCOURAGE CABLE OPERATORS FROM ADDING NEW PROGRAMMING SERVICES.

IT IS BY NO MEANS COINCIDENTAL THAT SUBSTANTIAL NEW INVESTMENT IN CABLE PROGRAMMING AND TECHNOLOGY HAS BEEN MADE SINCE ENACTMENT OF THE 1984 CABLE ACT. FROM 1984 TO 1989, CABLE OPERATORS' INVESTMENT IN BASIC PROGRAMMING TRIPLED FROM $300 MILLION/YEAR TO NEARLY $1 BILLION/YEAR. WITH RATE REGULATION OF SATELLITE SERVICES THIS TREND WOULD NOT LIKELY CONTINUE.

IF THE PUBLIC POLICY OBJECTIVE IS TO ASSURE THAT ALL AMERICANS CAN RECEIVE LOCAL BROADCAST CHANNELS PLUS PUBLIC, EDUCATIONAL AND LOCAL GOVERNMENT ACCESS CHANNELS AT A REASONABLE PRICE, THAT OBJECTIVE CAN BE ACCOMPLISHED WITHOUT DISCOURAGING INVESTMENT IN NEW SATELLITE PROGRAMMING.

FCC VS LOCAL RATE REGULATION

WERE THERE TO BE RATE REGULATION OF THESE CHANNELS, I WOULD SUPPORT THE "STAFF DRAFT" APPROACH OF EMPOWERING THE FCC TO SET NATIONAL RATE STANDARDS. I AM CONCERNED, HOWEVER, ABOUT ALLOWING CITIES AND STATES TO PREEMPT FCC REGULATION IF THEIR PROCEDURES "PROVIDE AN OVERALL LEVEL OF PROTECTION TO CONSUMERS THAT IS AT LEAST AS GREAT AS THE PROTECTION PROVIDED BY THE FCC."

MY FEAR IS THAT OUR INDUSTRY COULD AGAIN FIND ITSELF SUBJECT TO THE WHIMS AND POLITICAL PRESSURES OF CITY COUNCILS. IF THE FCC STANDARDS SET CLEAR PARAMETERS, THEN THERE'S NO REASON REALLY TO INVOLVE CITY COUNCILS. ON THE OTHER HAND, IF THE FCC

STANDARDS ALLOW LOCAL DISCRETION, THEN WE'RE RIGHT BACK WHERE WE WERE FROM 1972 TO 1984. ACTUALLY WE COULD BE WORSE OFF. ACCORDING TO THE AUGUST 1989 GAO STUDY, NEARLY ONE THIRD OF ALL CABLE SYSTEMS HAD BEEN RATE DEREGULATED PRIOR TO THE 1984 CABLE ACT. STATES LIKE MASSACHUSETTS AND CALIFORNIA HAD DEREGULATED CABLE RATES IN 1980. I WOULD URGE, THEREFORE, THAT ANY LEGISLATIVE PROPOSAL "GRANDFATHER" THOSE COMMUNITIES THAT WERE DEREGULATED PRIOR TO THE CABLE ACT.

MUST-CARRY

OUR INDUSTRY HAS CONSISTENTLY SUPPORTED THE MUST-CARRY AGREEMENT REACHED IN 1987 BY THE NAB, INTV, NCTA AND CATA. MR. CHAIRMAN, WE ALSO SUPPORTED YOUR RECENT PROPOSAL TO IMPLEMENT THE INTER-INDUSTRY AGREEMENT AND AUTHORIZE THE FCC TO RESOLVE CHANNEL POSITIONING ISSUES.

SEVERAL MUST-CARRY PROPOSALS PENDING BEFORE YOUR COMMITTEE GO BEYOND THE INOUYE PROPOSAL BY ELIMINATING ENTIRELY THE REQUIREMENT THAT BROADCAST STATIONS MEET MINIMAL VIEWING STANDARDS. AS A RESULT OF THESE INCREASED BROADCAST CARRIAGE REQUIREMENTS, WE WOULD BE FORCED TO DROP EXISTING CABLE SERVICES, LEADING TO CONSUMER UNHAPPINESS WITH THE RESULT. TO BE CLEAR, THE ADDITIONAL BROADCAST STATIONS AT ISSUE HERE ARE INDEPENDENT UHF STATIONS WHICH CARRY LITTLE OR NO LOCAL PROGRAMMING AND ATTRACT LESS THAN A 2% SHARE OF THE VIEWING AUDIENCE. THEIR SCHEDULES ARE MOSTLY MADE UP OF SYNDICATED

PROGRAMS AND THERE IS NO PUBLIC POLICY REASON NOR CONSTITUTIONAL RATIONALE WHY THESE STATIONS SHOULD BE ENTITLED TO PREFERRED STATUS OVER CABLE PROGRAMMERS LIKE A & E, CNN, C-SPAN, AND DISCOVERY.

"MUST-CARRY/MUST-PAY"

ON THE SUBJECT OF MUST-CARRY LET ME SAY THAT I REGARD THE NAB'S "MUST-CARRY, MUST-PAY" PROPOSAL TO MEAN THAT THE BROADCAST INDUSTRY DOES NOT REALLY CARE ABOUT SEEING THE MUST-CARRY ISSUE RESOLVED.

FOR YEARS BROADCASTERS HAVE SOUGHT AND BENEFITED FROM FREE CABLE CARRIAGE. BY EXTENDING THE REACH OF BROADCAST SIGNALS, CABLE OPERATORS HAVE ENABLED BROADCASTERS TO SELL MORE ADVERTISING AND GENERATE GREATER PROFITS. DUE IN LARGE PART TO EXPANDED REACH AND ENHANCEMENT OF THEIR SIGNAL BY CABLE OPERATORS, THE NUMBER OF INDEPENDENT TELEVISION STATIONS HAS TRIPLED OVER THE PAST DECADE. HAVING PAID NOTHING FOR CABLE'S ENLARGEMENT OF THEIR AUDIENCE, APPARENTLY SOME BROADCASTERS NOW FEEL THAT THEY'RE ENTITLED TO 20% OF CABLE REVENUES. APPLYING THE SAME LOGIC, BROADCASTERS NEXT WILL WANT 20% OF ANTENNA SALES REVENUES FROM LOCAL APPLIANCE STORES.

MY POINT IS THAT "MUST-CARRY, MUST-PAY" IS NOT A WAY TO RESOLVE THE MUST-CARRY ISSUE. IT IS A RIDICULOUS CONCEPT CONCOCTED BY CBS AS A WAY TO MAKE UP FOR ITS DECLINING

VIEWERSHIP SHARE. BUT IF BROADCASTERS WANT TO PURSUE "MUST-CARRY, MUST-PAY," THEN I'D URGE YOU TO CONSIDER "MUST-CARRY, MUST-PAY" SEPARATELY FROM ANY CABLE RE-REGULATION BILL THIS YEAR. I AM CONFIDENT THAT MANY LOCAL BROADCASTERS WILL COME TO SEE THAT CBS' PROPOSAL IS NOT AT ALL IN THEIR INTEREST. FOR IF CABLE OPERATORS ARE FORCED TO PAY TO RETRANSMIT LOCAL SIGNALS, THEN WE ARE GOING TO INSIST ON CHOOSING WHICH STATIONS TO CARRY. AND "CARRY ONE, CARRY ALL" IS NOT HOW THE MARKETPLACE WORKS.

MANDATORY ACCESS

SINCE THE EARLY 1970'S THE CABLE INDUSTRY HAS BEEN ENCOURAGED BY CONGRESS AND THE FCC TO DEVELOP ITS OWN SOURCES OF PROGRAMMING. HAVING NOW INVESTED HUNDREDS OF MILLIONS OF DOLLARS IN DEVELOPING NEW AND INNOVATIVE PROGRAMS AND SUCCEEDED IN BRINGING DIVERSITY TO THE VIDEO MARKET PLACE, IT SEEMS UNREASONABLE, TO SAY THE LEAST, TO REQUIRE THAT CABLE PROGRAMS BE MADE AVAILABLE TO ALL OUR COMPETITORS. IN MY VIEW, MANDATORY ACCESS REQUIREMENTS STRIKE AT THE VERY HEART OF OUR BUSINESS.

I APPRECIATE AND SHARE SENATORS GORE'S AND FORD'S CONCERN FOR CONSUMERS IN RURAL COMMUNITIES WHO CANNOT GET CABLE. AND DUE IN PART TO THE SENATORS EFFORTS IN THIS AREA MOST CABLE PROGRAMMING SERVICES TODAY ARE AVAILABLE TO HOME SATELLITE DISH OWNERS IN RURAL AMERICA AT PRICES COMPARABLE TO BASIC CABLE FEES.

THE PROPOSALS UNDER CONSIDERATION, HOWEVER, GO MUCH BEYOND ENSURING THAT RURAL AMERICA HAS ACCESS TO PROGRAMMING.

FOR INSTANCE, BOTH THE DANFORTH BILL AND THE "STAFF DRAFT" MANDATE THAT CABLE PROGRAMMING BE MADE AVAILABLE TO ENTITIES SUCH AS SKY CABLE, THE RECENTLY ANNOUNCED DBS JOINT VENTURE BETWEEN GENERAL MOTORS, NBC (GENERAL ELECTRIC), RUPERT MURDOCH'S NEWS CORPORATION, AND CABLEVISION SYSTEMS. IN 1988 THESE COMPANIES HAD COMBINED REVENUES OF ALMOST $180 BILLION -- 12 TIMES THOSE OF THE ENTIRE CABLE INDUSTRY.

IT IS HARD TO FATHOM WHY RUPERT MURDOCH, NBC AND GENERAL MOTORS NEED A GOVERNMENT SUBSIDY TO GET STARTED IN ANY BUSINESS. IF THE DEVELOPMENT OF DIVERSE PROGRAMMING AND FREE MARKET COMPETITION ARE DESIRED PUBLIC GOALS, THEN RUPERT MURDOCH AND NBC SHOULD DEVELOP AND UTILIZE THEIR OWN PROGRAMMING.

SERVICES LIKE BLACK ENTERTAINMENT TELEVISION, DISCOVERY, NICKELODEON AND CNN WOULD NOT EXIST BUT FOR THE INVESTMENT BY CABLE OPERATORS IN THESE SERVICES. OTHERS WITH MUCH DEEPER POCKETS WERE UNWILLING TO TAKE THE RISK.

THE MESSAGE OF MANDATORY ACCESS IS THAT THE REWARD FOR TAKING THIS RISK AND FOR DEVELOPING BRAND NAME IDENTIFICATION FOR CABLE'S PRODUCTS IS THAT COMPANIES LIKE GM AND GE CAN TAKE OUR PRODUCT AND USE IT TO COMPETE WITH US, FREE OF ANY OF THE PUBLIC SERVICE OBLIGATIONS REQUIRED BY OUR FRANCHISES.

EXCLUSIVE DISTRIBUTORSHIP RELATIONSHIPS ARE VERY COMMON IN THE MARKETPLACE. FROM THE AUTOMOTIVE INDUSTRY TO THE APPLIANCE INDUSTRY, EXCLUSIVE DISTRIBUTORSHIPS ARE AN INTEGRAL PART OF AMERICAN BUSINESS. FORD DEALERS CANNOT SELL GM CARS AND NOT EVERY APPLIANCE DEALER CAN SELL MAYTAG OR KENMORE WASHERS.

THE FCC ITSELF HAS RECOGNIZED THE IMPORTANCE OF EXCLUSIVITY IN ITS RECENT SYNDEX DECISION, AND BROADCAST NETWORK/AFFILIATE RELATIONSHIPS REPRESENT THE VERY ESSENCE OF EXCLUSIVITY. YOU WILL NOT SEE NBC PROGRAMMING ON CBS, NOR FOR THAT MATTER SOLD TO CABLE OPERATORS AS NBC AFFILIATES. IRONICALLY THOUGH, MANDATORY ACCESS PROVISIONS WOULD FORCE US AS CABLE OPERATORS TO SELL OUR PROGRAMMING TO NBC AND ITS SKY CABLE PARTNERS.

VIDEO DIAL TONE

BROADCASTERS AND DBS COMPETITORS ARE NOT THE ONLY COMMERCIAL INTERESTS WHO WOULD BENEFIT FROM PENDING LEGISLATIVE PROPOSALS TO THE CABLE INDUSTRY'S DETRIMENT.

THE VIDEO DIAL TONE PROPOSAL FIRST ADVANCED BY NTIA WOULD AUTHORIZE PHONE COMPANIES TO TRANSMIT VIDEO PROGRAMMING DIRECTLY TO CONSUMERS WITHOUT EITHER OBTAINING A MUNICIPAL FRANCHISE. THIS ELIMINATES ONE OF THE KEY AND SPECIFICALLY NEGOTIATED PROVISIONS OF THE 1984 CABLE ACT WHICH WAS INCLUDED TO ENSURE THAT CABLE OPERATORS WOULD NOT BE SUBJECT TO UNFAIR COMPETITION FROM PARTIES WHO ARE UNWILLING TO MEET SERVICE OBLIGATIONS

SUCH AS PUBLIC, EDUCATIONAL AND GOVERNMENT ACCESS REQUIREMENTS OR PAY 5% FRANCHISE FEES.

THE CABLE ACT'S CROSS OWNERSHIP PROHIBITION AFFECTS ONLY A LOCAL TELEPHONE COMPANY'S ABILITY TO OFFER CABLE SERVICE DIRECTLY TO THE PUBLIC OR ENGAGE IN PROGRAMMING. TELEPHONE COMPANIES TODAY LEGALLY MAY BUILD AND OWN COMMON CARRIER VIDEO DISTRIBUTION FACILITIES. IN FACT, IN CITIES SUCH AS PALO ALTO, CLEVELAND AND WASHINGTON, D.C., TELEPHONE COMPANIES HAVE LEASED BROADBAND NETWORK SERVICES TO CABLE OPERATORS. IF TELEPHONE COMPANIES TRULY BELIEVE THAT PROVIDING VIDEO SERVICES OVER INTEGRATED BROADBAND NETWORKS MAKES ECONOMIC SENSE, THEN THEY SHOULD BE ABLE TO CONVINCE PROGRAMMERS TO APPLY TO MUNICIPALITIES FOR FRANCHISES.

FRANCHISE RENEWALS

THERE IS ONE OTHER ISSUE I WOULD LIKE TO COMMENT UPON AND THAT IS REMOVAL OF THE "PREPONDERANCE OF THE EVIDENCE" STANDARD WHICH CITIES MUST MEET IF THERE IS A COURT APPEAL OF THE DENIAL OF A FRANCHISE RENEWAL. SINCE ENACTMENT OF THE CABLE ACT THERE HAS NOT BEEN A SINGLE REPORTED CASE WHERE THIS PROVISION HAS BEEN AT ISSUE.

ONE OF THE KEY ELEMENTS OF THE CABLE ACT WAS THAT IT AFFORDED CABLE OPERATORS A REASONABLE EXPECTATION OF FRANCHISE STABILITY. THIS TOO HAS CONTRIBUTED TO INCREASED LONG-TERM

CAPITAL INVESTMENT. TO WEAKEN THE RENEWAL PROVISION OF THE CABLE ACT CAN ONLY SERVE TO CREATE UNCERTAINTY IN THE BANKING COMMUNITY, REDUCING THE AVAILABILITY OF FINANCING FOR SYSTEM EXPANSION AND MODERNIZATION.

TO REMOVE THE "PREPONDERANCE OF EVIDENCE" STANDARD AND REPLACE IT WITH A WATERED DOWN "SUBSTANTIAL EVIDENCE" TEST IS ALSO LIKELY TO CREATE ADVERSARIAL RELATIONSHIPS BETWEEN CITIES AND CABLE OPERATORS. INDEED, SOME CITIES WOULD SEE THIS AS A SIGNAL FROM CONGRESS THAT THE EVIDENTIARY PROTECTIONS OF THE CABLE ACT NO LONGER COUNT.

CONCLUSION

MR. CHAIRMAN, I APPRECIATE THAT THE "STAFF DRAFT" IS A DRAFT, A STARTING POINT FOR DISCUSSION. I ALSO APPRECIATE THAT THERE ARE SERIOUS CONCERNS WHICH HAVE LED TO DEVELOPMENT OF THIS AND OTHER LEGISLATIVE PROPOSALS. MY CONCERN IS THAT SOME OF THESE MEASURES MAY ACTUALLY BE COUNTER PRODUCTIVE TO THE DEVELOPMENT OF NEW PROGRAMMING, MODERNIZATION OF PLANT AND FACILITIES, AND CUSTOMER SERVICE IMPROVEMENTS.

I HOPE THAT THERE WILL BE OPPORTUNITY TO WORK WITH YOU AND YOUR STAFF TO FASHION REGULATORY MEASURES THAT ADDRESS CONSUMER PROBLEMS WITHOUT REDUCING OUR ABILITY TO DELIVER THE BEST QUALITY SERVICE TO OUR CUSTOMERS AND COMPETE IN THE MARKETPLACE.

THANK YOU.

Senator INOUYE. I thank you very much, Mr. Hostetter. Now, may I recognize Mr. Burchill.

STATEMENT OF THOMAS BURCHILL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, HEARST/ABC-VIACOM ENTERTAINMENT SERVICES

Mr. BURCHILL. Thank you, Mr. Chairman and members of the Committee. My name is Thomas F. Burchill. I am President and Chief Executive Officer of Hearst/ABC-Viacom Entertainment Services, the venture that encompasses LifeTime Television.

I hope I can give you some insight today from a programming point of view on exactly how the Cable Act has had a favorable effect on cable programming networks, allowing them to produce distinct and high quality television. This was precisely the kind of world envisioned in the Cable Act of 1984. I sincerely hope that I can show you how the cable industry is now priming the production pump for American television but isn't getting the full credit the industry deserves.

Tracing the history of our company should provide you with a vivid example of how deregulation is working for the consumer. LifeTime was launched in February 1984 as a merger of two failing cable programming ventures called Cable Health Network and Daytime. This explains our co-venture ownership structure involving Hearst, ABC Cap Cities and Viacom, although we have no organizational or marketing connection to those companies.

In fact, we operate as an independent, advertiser-supported network. I have had the pleasure of being the President and CEO from the very beginning. After a fitful start in the days prior to deregulation, LifeTime grew and achieved its first full year in profitability in 1986, thanks to the addition of affiliate fees which supported the enhancement of our programming.

What are some of the reasons for our current success? Since that time and with the full support of the cable industry, we have become a strong and vibrant programming entity in this deregulated environment for the following reasons. We of course had the support of owners who collectively still have $100 million in unrecovered investment funds in LifeTime.

We choose to operate as a niche business, becoming a targeted or vertical channel. Our mission is to be the first channel choice for women, providing programming dedicated to the special information and entertainment needs of American women.

For cable operators and viewers we provide an expanded menu of programming choice and for advertisers we provide a 24-hour opportunity to reach a target audience no longer as available during the traditional daytime hours due to changing lifestyles.

When it comes to programming our dual income stream allows us to make a commitment to quality on air environment. During the day time hours, thanks to the unique economic equation of the cable industry, LifeTime is able to provide highly targeted programming aimed at narrow audiences.

One example is the very successful series, What Every Baby Knows, starring Dr. T. Berry Brazelton with advice for young mothers. At night our programming is consistent in its appeal but is more entertainment oriented.

LifeTime was able to rescue The Days and Nights of Molly Dodd from the ashes at NBC, giving a second life to this critically acclaimed series about a single woman.

In addition, we are not in various stages of production with the first five of a commitment to 15 made-for-LifeTime, original-to-cable movies. Both Molly Dodd and the original movies are expensive, high-risk investments for LifeTime which we probably would not have undertaken solely on an advertiser-supported basis.

LifeTime is also very proud of its public service programming commitment, with a series of prime time specials called Your Family Matters, touching on issues of importance to women.

We have won many awards for our programming and outreach on such issues as child care, breast cancer and children of divorce. Ratings and profits are not the objective of the Your Family Matters series but this is an ongoing commitment of the network, primarily supported by affiliate fees.

In a worldwide marketplace for television product, cable deregulation has contributed to LifeTime as an American cable programming success story. That programming has increased the number of subscribers to cable and the cable operator has put us on the lowest tier, exposing LifeTime to the widest possible audience.

We have built a major studio facility in Astoria, New York, a $50 million hardware investment. Our current plan for spending on programming product through the end of the decade approaches almost $1 billion.

Multiply that investment in some form by the dozen or more ad-supported satellite channels, and you can understand why I say that the cable industry in its current environment is priming the television production pump as never before.

The prospect of rate reregulation will choke off those aggressive levels of programming investment. Rate reregulation forces downward pressure on affiliate fees. It discourages aggressive programming investments by cable networks such as ours.

In fact, the programming most likely to disappear first from the TV screen in this environment is the narrow appeal for public service product. Rate reregulation will also slow system rebuilds, limiting channel capacity for carriage of existing networks and with no channel capacity for new networks.

The system begins to work against the interests of the consumer and the programmer if, as part of a rate reregulated tier, we stand to lose affiliate income for programming investment or if, as part of a higher tier, we lose the distribution we count on for advertiser income, it becomes a negative vicious cycle.

I would also like to address for a moment the questions of access and pricing policy. LifeTime's current policy is to sell our programming on a nonexclusive basis to all interested parties.

In fact, we are aggressively marketing a service to all distributors and can be viewed in almost 47 million households. But we do not want to be legislated or mandated to have to sell to everyone. The marketplace solution creates the best incentive for business arrangements that reflect our costs and the right kinds of distributor promotion and marketing plans for our network.

LifeTime also believes there are good reasons for pricing flexibility among these different distributors because of differences in marketing appetite and our own organizational, encryption, and administrative expenses.

LifeTime, along with other targeted independent networks such as Arts and Entertainment, ESPN, Financial News Network and the Nashville Network, all provide added consumer value and programming choice in a deregulated and marketplace environment.

I hope you will see that reregulation of cable will likely choke that programming pump for one of the products in a worldwide marketplace where America truly has an edge.

Thank you, Mr. Chairman, I would be happy to answer any questions.

Senator INOUYE. All right, thank you very much.

I would now like to recognize the author of 1880, to begin the questioning. Senator Danforth?

Senator DANFORTH. Mr. Chairman, thank you very much. I am going to direct my questions to Mr. Mooney in the interests of time, and if, Mr. Burchill or Mr. Hostetter, you disagree with Mr. Mooney, please feel free to chime in.

Mr. Mooney, the theory of the legislation is that unregulated monopolies are wrong, and that cable television does constitute a monopoly within each community and unless there is an alternative multi-channel provider, there should be regulation.

You contest that concept, and I think that that difference of opinion is really at the heart of what the controversy is, and I would like you to explain your view.

Mr. MOONEY. I think I have really given up arguing whether or not cable is a monopoly because I think the more relevant analysis has to do with whether there are things in the marketplace, things that are substitutes or near substitutes to cable, that act as a check on cable penetration and cable pricing.

And our experience of the business has been, for example, that the more broadcast stations you have in a given market, they together operate as a kind of multi-channel source of television and this—cable and broadcast—is really all TV. It is different kinds of TV, but it is still TV, and the presence of broadcast TV tends to hold down both pricing for our services as well as penetration.

It is an axiom in the business for example, that the larger the market, your penetration levels tend to be lower because people figure, what they need they can get for free without buying it.

Here in the District of Columbia, for example, of the homes passed by District Cable, and that will be almost built out by the end of the year, they are only selling to about 37 percent of the households that can buy it.

I should say too, though, that it is apparent to me and I must say it is apparent to most of the people that I represent, that having argued this case for quite a while now, there is sufficient concern in the Congress, likely to result in legislation of such form.

And we are not going to take the attitude that sometimes is taken by the business community to the effect that oh, whatever you do to us, any little change is going to kill us, we are going to see what can be worked out, and we will try to the greatest degree we can to cooperate with you.

Senator **Danforth**. I accept that. I was hoping to get a little difference of opinion maybe on whether or not this is a monopoly or not, but I have long since learned that if it is not contested, do not press the matter.

Mr. **Mooney**. I think that if you live and work in the television world, you find that these businesses are very hotly competitive. If they were not hotly competitive you would not have the broadcasters up here involving themselves in the issues like rate regulation and the circumstances under which our franchises are to be renewed and whether we can have exclusive rights to our product because otherwise they would not care.

But I think their vigorous presence in this is in itself a kind of negative testimony to the degree to which these businesses——

Senator **Danforth**. I would doubt that. I mean it seems to me that one industry can affect the health of the another industry and still constitute a monopoly, and I of course would argue that it is a monopoly.

Mr. **Mooney**. I know.

Senator **Danforth**. Let me then move to a different question. Perhaps the most fundamental difference between S. 1880 as it was originally introduced and the staff draft has to do with the coverage of the standby regulatory scheme.

The original bill, only the basic cable service was covered, and in the staff draft, what could be called the expanded basic service was also covered.

When this was explained to me I was convinced that the staff draft was right because it seems to me that if we attempt to provide standby regulation, some sort of control on rates, for a fraction of the service only, the effect of that would be that increased rates would immediately be placed on things like ESPN or MTV, and there would be a huge uproar.

You know, why are you raising our rates on ESPN? Would you comment on this particular difference between the staff draft and the original bill?

Mr. **Mooney**. Well, without getting into the fine details of the two documents, it seems to me there are two main differences between S. 1880 and the staff draft on that subject. One has to do with the ambit of services which are covered, the ambit of services in your bill was somewhat narrower than the staff draft, which took in just about everything short of the premium pay services.

The two documents are different also, however, in that the staff draft tends to place major responsibility on the FCC for devising a method of handling this, whereas S. 1880 effectively gives that authority back to city councils for the subject matter that is covered.

I think I would recommend that you consider that you do not necessarily have to directly regulate something in order to give the cable operator an incentive to exercise restraint. Suppose you created, for example, or you mandated creation, of a relatively lean tier of basic service, but made sure that that was offered at a very attractive price.

If you did that you would create a disincentive on the part of the cable operator to price the other services too high for fear that too many people would migrate from the larger package to the smaller ones.

I think that there are quite a few legitimate concerns on this, running to the health and nourishment of the cable programming industry, which as I have tried to suggest is still really an adolescent stage. And we have a great many fears that if regulation is applied to this area, as Mr. Burchill suggested, you might well halt dead in its tracks the further development of new cable networks and the further improvement of the ones that are there.

Mr. HOSTETTER. May I respectfully suggest, Senator, that I do not think it is strictly an issue of whether a particular business is a monopoly or not. I think you need to go on and ask the secondary questions: one, is it unregulated or does effective regulation exist, and two, how much of a necessity is it?

As to a monopoly, one of our very first systems was in northwestern Ohio, and we started in a town very near Lima, Ohio which had a single UHF television station. There was no other television in the market.

They were a monopoly, an absolute monopoly and they were a monopoly as a result of the FCC licensing process, but no one ever proposed that they should be subject to rate regulation because in fact there were other ways that local merchants could advertise their products.

There were newspapers, there were billboards, there was a whole panoply of alternatives which existed. So I do not think the presence of a sole provider necessarily leads to the assumption that we must have comprehensive rate regulation.

I think you need to ask the secondary question of: Is it a necessity and it is in effect unregulated? And as to cable on those subjects, I would say despite my very best efforts over a 26 year period, 44 percent of the people we pass by cable have decided they do not need us at all.

You know, the industry, as a general proposition, is 50 percent to 55 percent penetrated. There are an awful lot of people out there who seem to be living very happy lives without access to cable TV.

So one, I do not think it is a necessity, and finally, is it unregulated? I think there is a very effective substitution going on with other products, be it broadcast television, be it video cassettes, be it nights out at local entertainment spots——

Senator DANFORTH. Watching your aquarium.

Mr. HOSTETTER. Watching the New England Aquarium, which we hope the Senate will take considerable notice of. It is an important institution. The ability for the consumer to be able to make the individual choice of, I will pay this much, but I will not pay something more, has had the result of keeping cable rates since deregulation pretty much in line with what has happened to changes in the CPI.

And yes, there has been occasional aberrant behavior by some operators in some locations, but across the board, your own Government Accounting Office's numbers say this has been a pretty good surrogate for what has happened to consumer prices generally.

So to summarize, we may well be a monopoly and certainly there are very few communities where there is more than one wired multi-channel provider. But that does not mean that we are a necessity or that we are unregulated.

So before we rush in with a comprehensive regulatory scheme, I think we ought to be weighing the public benefits against the public costs.

Senator **Danforth**. Thank you, Mr. Chairman.

Senator **Inouye**. Senator Gore.

Senator **Gore**. Thank you very much, Mr. Chairman. Mr. Burchill, I want to begin by complimenting you and your colleagues at LifeTime. I think you do an outstanding job, and sometimes when we ask for a programmer to come and join a cable panel, they very wisely get the very best find of programmer they can find and I think that is legitimate and you are really cable's best foot forward at this hearing.

The issue really is not whether cable can invest in and thus stimulate new, good programming, but whether cable can discriminate against those services which it does not own. And where the anti-competitive issue is concerned, I would like to, Mr. Mooney, ask you a couple of questions about what I believe is anti-competitive behavior.

I have raised the example in the past of the Christian Broadcasting Network. Here is a service that has an incentive to be seen by as many viewers as possible. In fact, people in rural areas with satellite dishes are probably more likely to be receptive to the 700 Club message than those in the cities.

At least for a while the host was running for president. He wanted a lot of viewers for that reason. They were asking for contributions. They had advertisements. They were preaching the Gospel and still are.

And so for all these reasons they want as many viewers as they can possibly get. Why did they initiate action which deprived 2 million satellite dish owners of the right to watch that program? Do you know?

Mr. **Mooney**. I do not know that they did. I am unfamiliar with the——

Senator **Gore**. Well, they decided to scramble and it was extremely controversial and at the time there were statements saying that the cable industry forced them to scramble.

I have a letter that I would like to read into the record from their affiliate in Canada to their subscribers in the Christian Broadcasting Network 700 Club, and here I am quoting directly from the secretary to the general manager:

> Dear Friends, The cable companies are forcing Christian Broadcasting Network and other stations to scramble their signals. They are looking to the future and can see more use of satellite dishes, which cuts into their revenue and will ultimately eliminate the need for their existence, so by forcing the stations to scramble their signal, there will be continued use of the cable.

She says the ultimatum was "do it or you are off our cable network." She said, "We could not take lightly nor presume that the cable companies threats were idle. We regret that we had to make a decision that would and will affect the ability of some to view the 700 Club. However, the bottom line was, we had no choice and did arrive at this decision to scramble after making it a matter of prayer."

I will put the full text of the letter into the record.

Does that not imply an anti-competitive action by the cable industry to eliminate access to a popular program over satellite dishes?

Mr. MOONEY. Senator, I believe, and this is not the first time the matter of that channel being scrambled has arisen, I believe you have had in your files and there is in the committee's file, has been in the committee file for the last 18 months, at least, a letter from Pat Robertson, who is the chairman of that company, specifically and vehemently denying the accuracy of these reports that he in any way was forced to do anything by anybody.

And as a matter of fact, I think at one point he even asked or his son even asked to come before the Committee and say so in person.

As for scrambling, I do not think at all that the mere scrambling of signals is intended to deny anything to anybody. All of these things amount to pay television. Sure, a lot of them include advertising, but most cable basic channels still get most of their money from subscriber fees and it is very tough to generate any kind of revenue of that kind if you are effectively giving it away for free with an unscrambled transmission.

So, no, I do not think that the mere scrambling of anything reflects an intention to deny access to it.

Senator GORE. Now, explain to me again, first of all, of course, since he depends for almost 100 percent of his revenue now on the cable industry, he is not going to go out of his way to anger the companies that control whether or not he is seen. But this letter I think speaks for itself and says very clearly that they were given a threat, an ultimatum. Do it or you are off our cable network. "They are forcing us to scramble our signals."

But explain to me again, why would Christian Broadcasting Network want to voluntarily prevent 2 million rural Americans from seeing their signal?

Mr. MOONEY. He would not want to prevent them from seeing it. He would want to scramble it so he could get people to pay for it in return for watching it.

Senator GORE. So they could pay for it, to listen to the pleas for them to send in voluntary contributions?

Mr. MOONEY. No, so they could pay the subscriber fees that he also charges to cable operators so that he can have somebody put it in a package so that it can be sold to people and they pay subscriber fees.

Senator GORE. Okay, but see that is the rub. The cable industry controls the package and the cable industry wants to sell the package and they do not want anyone to be able to see it unless it is in the package and unless the cable company can charge for it.

That is the heart of this particular problem, and of course, there are many, many other examples of the same kind of anti-competitive behavior.

Now, Mr. Hostetter, I am not familiar with the record of your company. I am prepared to take on face value what you say about your service to your customers and one of our colleagues is from your area and he speaks very well of you.

I wish that you were in rural west Tennessee instead of Multivision, I will say that because our experience has been very different from the way you describe the experience your customers have had.

Do you agree it is a problem to have a fast buck operator come in and buy up a bunch of systems and jack the rates up almost 100 percent without any increase in service and then the local officials ask for some explanation and they do not even get their letters responded to?

What do you do about that kind of arrogance and contempt for the public? Do you have any recommendation on what we should do about that?

Mr. HOSTETTER. Well, I think what you in fact did was very effective, which is to use your position to raise the visibility of this issue and bring pressure on that kind of behavior. I think the behavior you describe is not only damaging to those communities, but damaging to everyone in the cable business.

I think what has happened, in a significant part through your efforts, is that a number of over builds have occurred and the operator has been put in serious economic danger and may in fact have to fold up and leave town.

In any event, it seems to me to be the perfect set of facts for the communities, to deny renewal.

Senator GORE. Well, that is a long time from now. Let me close with one comment because we have a vote. In one of those communities where they come in with an overbuild, the people had been getting—you know what their rates have been for the last three months? Zero. They had been given free cable television service for the last three months in an effort to drive into bankruptcy the company that is trying to overbuild, more anti-competitive behavior through predatory pricing.

See, we appreciate the free rates, but we know when the other shoe drops. Because it is an unregulated monopoly.

Thank you, Mr. Chairman.

Senator INOUYE. We have a very important vote pending at this time so I will call this hearing to a recess until 3:30.

[Recess.]

Senator INOUYE. Senator Gore.

Senator GORE. Thank you very much, Mr. Chairman.

Mr. Mooney, taking the problem of home satellite dish owners one step further, there is now a new cloud on the horizon for the millions of families not served by cable who must resort to purchasing their own hardware to receive what their urban counterparts can take for granted.

I assume you are familiar with the two major direct satellite ventures recently announced by TCI and a consortium involving Fox, NBC and Cablevision as well as others. I sincerely hope these enterprises are successful because they can in fact offer real local competition for cable.

I have some serious concerns, however, that in both cases cable MSOs, which have historically worked hard to snuff out local competition, are the major participants in each of these direct broadcast satellite plans.

Moreover, I understand that the programming to be distributed by these DBS systems would be sold primarily by local cable operators.

I hope we can have a thorough discussion of these plans during these hearings, and I would like to start that just with one question at this time, Mr. Mooney.

Do you believe that these ventures, organized in whole or in significant part by cable multisystem operators, are seriously planning to compete with themselves for local cable customers? Do you understand the question?

Mr. **Mooney**. Sure. Let us start with the most recent announcement. I think that the Sky Cable venture most definitely plans to compete directly with cable systems. That venture is composed of some companies which not only are among the largest in the United States, they are amongst the largest in the world.

NBC and Fox, backed by the money of General Electric and General Motors, represent not only world class deep pockets but world class programming companies. Cablevision is a very small participant in that deal and is in it primarily as a cable programmer and not as an operator. Indeed, Cablevision thinks of itself as more of a programming company than it does as a cable operating company.

I think that venture most definitely plans to compete with cable systems throughout the United States, and I think that, given the resources both financial and programming available to the participants, that will be a very serious enterprise.

Senator **Gore**. Now let us say one of the partners is a multisystem cable operator and the signal is beamed down into a franchise area where the land cable service is controlled by that partner in Sky Cable.

Do you expect Sky Cable to directly compete with the same company's ownership on the ground?

Mr. **Mooney**. In the Sky Cable venture?

Senator **Gore**. Right. In other words, you have the same company selling as part of the venture the signal over the satellite direct broadcast and the same company selling that signal over its cable system on the ground to the same potential customers.

Do you think that they are going to be tempted to collude and to maximize the profits of both ventures at the expense of the consumer?

Mr. **Mooney**. No, I do not. Sky Cable is going to be a very expensive venture. They can start losing money if they start holding back on who they offer to sell it to. That venture will have a footprint in satellite terms which will cover the entire continental United States, possibly excluding Alaska.

I think that they will very vigorously try to sell it to everybody. I think it would be foolish, indeed beyond reasonable expectation of the other partners in that venture, if they allowed the minority partner to somehow keep them from selling directly against cable.

Senator **Gore**. What about K Prime? TCI is not a minority partner there, is it?

Mr. **Mooney**. No, it is not.

Senator **Gore**. It is the controlling partner, would you say?

Mr. **Mooney**. I do not think they have a controlling interest.

Senator **Gore**. They are the biggest participant; correct?

Mr. **Mooney**. They may be, but I do not know.

Senator **Gore**. Well, if TCI is a major participant in K Prime and beams the signal into a service area where TCI cable companies are trying to sell the same signal, do you believe that TCI in the air will drive TCI on the ground into bankruptcy?

Mr. MOONEY. I understand that that venture is to involve primarily distant broadcast station signals and is intended primarily to serve both areas unserved by cable and as a supplement to cable services where there are cable wires using effectively a hybrid technology to increase the number of channels made available.

Senator GORE. The hybrid being the dish?

Mr. MOONEY. The hybrid being the K band dish.

Senator GORE. In other words, the satellite dish you would describe as a hybrid of the cable?

Mr. MOONEY. I would describe it as a supplement to the cable to add channel capacity.

Senator GORE. As a supplement to the cable?

Mr. MOONEY. Yes.

Senator GORE. Do you think it is anticompetitive for a direct broadcast satellite company to refuse to sell its signal except through local cable companies?

Mr. MOONEY. Not necessarily, depending upon what they are using the technology for. Mr. Hostetter is a participant in that venture, and he can tell you directly what his motivations and intentions are.

Mr. HOSTETTER. I am eager to do that. In large measure because of your success with the satellite bill last year, there is an entire group of channels that have been made available without incremental copyright liability. Distant independent stations, if transmitted by satellite, are not subject to copyright payment. Your good work, for which I commend you and I think the American public commends you——

Senator GORE. We did not yet pass that bill.

Mr. HOSTETTER. Yes, you did. It was passed during the last Congress.

Senator GORE. You are talking about the copyright bill.

Mr. HOSTETTER. Yes. The concept behind K Prime partners is that there are a limited number of available frequencies, something like 10 or 12, on which we want to carry a range of distant independent signals and try some pay-per-view programming.

So it is a supplemental service that in more rural areas will stand alone. We think it is a good enough service that people may want to buy it. In cable franchise areas we think it is a potential adding to the service that subscribers are already buying.

Senator GORE. Now I have been informed that it is planned for sale only through cable companies. Is that correct?

Mr. HOSTETTER. No such decision has been made. I mean, we are happy to have any sales that can be made. There will certainly be rural areas where there are no cable companies to sell it.

Senator GORE. Okay. There have been public statements that that is what the plan is now.

Mr. HOSTETTER. I think that is true of the so-called Sky Cable.

Senator GORE. I am talking about K Prime. Is that the one in which you participate?

Mr. HOSTETTER. Yes, it is.

Senator GORE. You are unsure whether it is limited to cable companies?

Mr. HOSTETTER. I do not believe it will be limited. This is a service with very high fixed costs. We are trying to get as many units of distribution as possible, and anyone who can successfully sell it is going to be welcomed.

Senator GORE. Of course, most all of the distribution of such signals now is arbitrarily limited to cable companies or ventures that are controlled by cable.

Mr. HOSTETTER. Again, with reference to your effectiveness on this subject, you are aware that the REA has created a third-party distributor that is selling and has no relationship with cable companies?

Senator GORE. Are you aware that the cheapest rate they have been able to get from the cable industry is 421 percent higher than the rate charged to cable franchises?

Mr. HOSTETTER. I am not privy to the rate package.

Senator GORE. Well, they came in and testified. In the fist year when the bloom was still on the rose and the deal was fresh, they said, oh, this is great, cable has negotiated with us and we are going to distribute this to satellite dish owners.

After one year's experience they came back and said these people are impossible to deal with. They are arrogant, they are monopolistic, they will not be fair with us, and the cheapest deal they will give us is 421 percent higher than what they will give their cable companies. They have asked us to pass the legislation. It is just ridiculous that they will not be fair.

Now that is a summary of their statement, if you will, but it is an accurate representation of what they said.

Now, continuing on with this problem of anticompetitive behavior, you mentioned, Mr. Mooney, that NBC was one of the participants in the Sky Cable venture, the first one to which I alluded.

NBC has also been a participant in CNBC. You are familiar with what happened in that episode, are you not?

Mr. MOONEY. I am familiar with what has been claimed. I am familiar with the fact that there are what I must regard as unsubstantiated allegations that somehow by requiring NBC to describe contractually what CNBC was going to look like when, prior to the launch of CNBC, they were trying to get carriage commitments. Some people found that to be untoward.

On the other hand, I do not know how people can be expected to make carriage commitments to CNBC without knowing what it was going to be a month in advance of its launch. They had a hard time telling you what it was going to be.

Senator GORE. They needed to know what it was going to be because they needed to know whether it was going to compete with them or not; right?

Mr. MOONEY. No, sir. They needed to know what it was going to be in order to make an intelligent judgment as to whether to assign very scarce channel capacity to a venture which was still quite murky in terms of its content.

Senator GORE. Let us just lay the facts out on the record here so that it is clear what happened.

NBC, the most profitable network in America, decided to launch a cable television news network to compete with CNN. CNN is now owned in significant measure by the cable industry; correct?

Mr. Mooney. The cable operators have a minority interest.

Senator Gore. But they share in the profits; right?

Mr. Mooney. Yes.

Senator Gore. Now NBC was told, just like this women in Christian Broadcasting Network said in that letter, by the cable industry we will not put you on our cable system if you plan to compete with CNN because that will cut into our share of the profits from CNN. So if you plan competition you can just as well forget about being on cable television.

So the mighty NBC was brought to its knees and forced to sign a formal agreement that they would not in any way compete with CNN. They launched the venture with a very ill-defined mission of providing business consumer news, and they will work up the courage to sort of nibble at the edges of their noncompete clause. But basically they agreed to a provision that deprives the public of the competition that would otherwise come if they had not been forced to agree not to compete.

Mr. Mooney. I have to say that I know of no testimony before this committee to the effect of a noncompete clause. What I recall is Bob Wright sitting in front of a Congressional committee one day a while ago and being repeatedly and forcefully asked if he thought that anything untoward had happened in that matter. He kept saying no, and finally he just stopped saying anything. I suppose people could have drawn an inference to the contrary.

Senator Gore. And they did.

Mr. Mooney. He kept saying no, and finally the man just became quiet.

Senator Gore. I do not remember it quite that way because it was right here in this committee room, and it was right there at that table. I do not recall his exact words, but I recall the message. It was do not embarrass me by asking me to just spell it out A to Z, but essentially, Senator, that is exactly what happened.

Mr. Mooney. If I may, there is one additional point I would like to make; that is, there is only so much capacity on cable systems, and cable operators have to decide in the interest of their subscribers how to assign that capacity. Now the news of the day is the news of the day, and you can get it either on CNBC or on ABC and CBS and NBC, but what you very frequently try to bring to your subscribers is something new, something different.

Senator Gore. As long as you have ownership, as long as you own it and as long as you share in the profits—you see, no premium program that is not owned by the cable operators is allowed on anymore. No new ones have been allowed on in quite a while.

The problem with CNBC was that it was going to compete with a service that the MSOs owned and profited from.

Now we can argue about the appearance of this thing all day long, but we both know what happened on this.

Mr. Mooney. No, sir, I do not. I wish to state for the record——

Senator Gore. Well, everybody else knows what happened.

Mr. Hostetter. I am also in the group that does not know. We have an investment in Turner, and we were approached by CNBC to carry their service. While some, if not most, of your facts are right, I do not think the characterization is correct.

Senator GORE. You see, you did not have to participate in the dirty deed because there are some ringleaders who are the lead horses. TCI led the way on this. They said, CNBC, you are going to have to change and not compete or else you will not get on the cable. I mean, that is what happened.

The larger issue which it represents is the one that troubles us. An unregulated monopoly is inherently against the public interest, because even if there are good guys in the business—and there are lots of good guys in the business.

Here is what Mr. Wright said. Here is my question. Did you agree not to agree directly with CNN in making CNBC a full-scale news operation in direct competition with CNN because TCI owns part of CNN's parent company? Was this part of the arrangement that also guaranteed you access for CNBC?

Mr. Wright said, "We have a provision in our affiliation agreement that was requested, required if you will, by most cable operators that we not enter into general competition with CNN."

"Is that not anticompetitive?"

"Well, it is not exactly what we would have preferred."

Can you understand that language, Mr. Mooney?

Mr. MOONEY. Yes. He did not want to be tied up any more than he had to be, and I can understand that.

Senator GORE. You really are going to earn your pay today if you can put a bright face on that statement.

Mr. BURCHILL. Senator, I am going to try, if I may. Just from the programmer's insight, more a process issue—and I certainly was not in the hearing room that day, but it is the normal course of business when a programming entity goes to a cable operator to ask for fee support to upgrade programming for the cable to ensure the widest possible choice and diversity of programming provided to consumers that he get some representation as to how those funds are likely to be directionally spent.

We have no problem in saying that the majority or thrust of our programming investments will reflect the interest of the channel.

I think you will find if you were to ask any programmer that that would likely be the course. I think it is more a question of ensuring diversity of programming for their customers to provide value than anything untoward.

Senator GORE. Of course, if it is the only game in town you are going to work with them on the terms that they insist upon.

I have gone over the amount of time which is reasonable here. I would like to conclude with this brief summary. I started to say this a minute ago. Even if there are good guys in this business—and there are lots of good men and women in the cable industry—the temptation to come in and make a fast buck is overwhelming. It is a little bit less so with what has happened to equity values in the last several months, but that will return if the monopoly is allowed to remain intact with no regulation and no competition.

The simple point is the one made long ago by Lord Acton. Power corrupts, and absolute power corrupts absolutely. It is true in economics, in politics and in every other field. The temptation comes out in many forms.

There is a temptation to shake down programmers who want access and say cough up some of your ownership or else we will not let you on cable.

There is a temptation to shut down potential sources of competition like the satellite dish industry by using the economic leverage to intimidate programmers and have them provide programs only at grossly inflated prices to the competitors.

There is a temptation to shake down customers as well and to raise rates as swiftly as possible to whatever the traffic will bear.

To come and say the nights out on the town are functional competition to cable is just not reasonable. You would have us believe that Nintendo games are effective competition for the cable service. In fact, multi-channel television service is the market here, and if there is no multi-channel competitor then there are monopoly profits earned at the expense of the consumers and at the expense of would-be competitors. That is why this issue has gotten as far down the road as it has.

I hope that in the time between these hearings and action by the Congress there can be some productive discussions about how to fine tune the measures we are considering to try to get a good result in the interest of the public.

Frankly, Mr. Mooney, in closing, I welcomed your comments earlier when you said we recognize there is going to be action and we would like to work with you. I think it is time for a dialogue on these issues.

I thank my colleagues for their indulgence.

Thank you, Mr. Chairman.

Senator INOUYE. Senator Packwood.

Senator PACKWOOD. Senator Gore mentioned something about the equity values in the past few months. I have not kept track. What has happened?

Mr. MOONEY. I think it is no secret that the cable stocks are off quite a bit, even as much as 30 percent in some cases, and at the same time money available from the lending community has become quite scarce. The general consensus is that this is partly, although not altogether, attributable to the regulatory uncertainty that currently surrounds the industry.

Senator PACKWOOD. You mean a fear that if you get regulated profits may fall precipitously and you are not as good a lending risk as you might otherwise have been?

Mr. MOONEY. I think it is not so much a fear that if there are any regulatory changes that the business will be severely harmed. I think it is a fear that the regulatory changes might go too far.

Senator PACKWOOD. Let me ask you a question in response to your answer to Senator Danforth about monopolies. He asked, is it true that you are a monopoly? As I understand the definition of a monopoly, it is almost an exclusive control in delivery of a service or product.

Mr. MOONEY. That is right.

Senator PACKWOOD. For most of us, electricity is a monopoly. We do not have many alternative ways. Water is a monopoly.

You can make an argument in some areas of transportation with some railroads where if you are a coal shipper you have only the railroad. You do not ship it by plane.

Your argument would be that you might be an exclusive franchisee of a city but you are not a monopoly because there are other ways of getting the product that you deliver. Is that correct?

Mr. MOONEY. If the product is defined as television, yes, that is correct.

Senator PACKWOOD. Well, is there any other? I mean, is that not the product?

Mr. MOONEY. Well, we think that is the product, and we hear people talk about the fact that a cable system is a multi-channel provider of television and tends to be the only one around in most places.

I think that in the presence of a significant number of broadcast signals, the TV set itself is a kind of multi-channel provider of television. We feel that day to day in the conduct of our business.

Now I think that in terms of monopoly, you know, while we do not technically have exclusive franchises in most places, franchising authorities almost everywhere are legally able to grant an additional franchise if they please. Nonetheless, there are in most places only one cable franchise.

Senator PACKWOOD. That part I understand, but I want to get to the Sky Cable thing in a minute, and I want to make sure that I understand how your signals work. I am not a scientist. I realize you pick them up and you distribute them through the cable if you are taking them off the satellite, but as I understand Sky Cable, are they going to distribute through the cable, or are they going to distribute directly down to a dish?

Mr. MOONEY. They are going to distribute directly down to a small dish.

Senator PACKWOOD. So in essence, they are like the big dish people now?

Mr. MOONEY. That is correct.

Senator PACKWOOD. We do not see many big dishes in urban areas. You see a few. They are kind of an odd looking thing, but you see a few. In fact, you see more and more, as a matter of fact. People apparently want this. This is an alternative to your cable delivery——

Mr. MOONEY. Right now.

Senator PACKWOOD [continuing]. And they would be a competitor to you.

Mr. MOONEY. That is right.

Senator PACKWOOD. Now regarding Sky Cable, if I have it right, is General Electric, NBC, Murdoch and Cablevision.

Mr. MOONEY. And GM.

Senator PACKWOOD. And General Motors? Okay. In any event, it is a combine. How much of this combine is Cablevision?

Mr. MOONEY. Very small. I think their percentage of the equity is about 10 percent. My understanding is that it is mostly GM money.

Senator PACKWOOD. So they are a small part, and if I read the figures right Cablevision now has about 1 million subscribers.

Mr. MOONEY. That is right. I think they are in the partnership not because of the 1 million subscribers but because of the regional sports networks.

Senator PACKWOOD. I am going to get to that.

There are about 50 million subscribers in the nation, so while Cablevision is not insignificant it is hardly a giant of the industry?

Mr. MOONEY. That is right.

Senator PACKWOOD. So the argument that would be made that the partners of Cablevision and Sky Cable would somehow be willing to bend to Cablevision's wishes when they happen to have only a million subscribers just does not make sense.

Mr. MOONEY. I do not think so.

Senator PACKWOOD. This great combine is in the business, I guess, of programming and delivering programs. None of these other parts of the combine own any cable systems, do they?

Mr. MOONEY. Not to my knowledge.

Senator PACKWOOD. So it is no skin off their nose if they beat you?

Mr. MOONEY. That is quite correct.

Senator PACKWOOD. Now explain to me about this little dish. In this little dish you are going to be able to pick up 108 channels?

Mr. MOONEY. Well, there is some skepticism of that in the engineering community. I think that their 108-channel statement is premised on an assumption having to do with future development in the near term of digital compression technologies, but I do not think they need 108 channels to compete effectively.

Senator PACKWOOD. If they can do 20 or 30.

Mr. MOONEY. Sure. The average cable system right now is 36 channels.

Senator PACKWOOD. Again, if either of you other two want to answer this.

In your judgment, will they technically be able to do this little dish reception and do 20, 30 or 40 channels in the near scientific future?

Mr. HOSTETTER. Without any compression techniques, they have 27 channels. They have the orbital slot. All they lack is the launch carrier to load the satellite and take it up. The technology is here today.

Senator PACKWOOD. Well, that is just a question of reservation, is it not?

Mr. HOSTETTER. Yes, it is. There are no miracles of technology needed to allow them to deliver a 27-channel service directly to an 18-inch dish at home.

Mr. MOONEY. I have one of those antennas, one of those little flat dishes in my closet in the office, and I have had it there for two years since I bought it in Japan. I mean, this thing works.

Senator PACKWOOD. You do not even have to put it outside?

Mr. MOONEY. You can put it in your windowsill.

Senator PACKWOOD. I assume if this works that Sky Cable is not going to be the only group that is going to be in this. I would think there would be a lot of people who will want to be in it.

Mr. HOSTETTER. Anybody with a spare $800 million.

Senator PACKWOOD. Well, there are more of those than you realize. The only way they could be competitive with you is if they feel that they have sensational programming that nobody else can get anywhere or they have programming of moderate quality or roughly equal to everybody else's quality and their price has to be roughly comparable, I assume?

Mr. Mooney. That is right, and we think that companies with program experience such as NBC and Fox will not have too much problem coming up not only with programming but perhaps some new and distinctive programing in addition to what else might be already available on the market.

Senator Packwood. Given this, how can the argument be made that you are a monopoly or, very frankly, why you may have an exclusive franchise that you have such a lock on the business that nobody else can get in? This company obviously intends to get in.

Mr. Mooney. They do not think we have a lock on the business; otherwise, they would not be putting up the money they are to get into this business.

Senator Packwood. What am I missing, then, in the allegation that you have such a lock that there simply is no other competitive programming, no other competitive delivery system, and it is unfair to the consumers?

Mr. Mooney. It is hard for me to make the argument from the other side. I think that people somehow sometimes instinctively mistake subscription television for a distinct market of its own, but that is not how people treat TV. People hooked up to a cable system sit there with that remote, and they dial through the broadcast channels and the cable channels and the pay channels as if they were all just TV. That is how the public treats television.

To say that cable is without competitors and has a unique hold on video in the home I think just does not comport with reality.

Senator Packwood. Let me ask you a further question. The reception on your little cable is pretty good, much better from the satellite than what we used to get over the air in cities with buildings and whatnot.

Mr. Mooney. It is pretty good.

Senator Packwood. Is there a possibility that Sky Cable would attempt to or maybe at least initially enlist subscribers by broadcasting commercially paid television rather than subscription?

Mr. Mooney. It is conceivable. In fact, that is the way Mr. Murdoch has done it in England. He gives away his five basic channels, including his news channel. People can go down to the hardware store, buy the dish, hook it up to the TV set, and the five basic channels are unscrambled. He uses that as an incentive for them to get the dish, and then he sells them the movie channel.

So there is precedent for that by a participant in this venture.

Senator Packwood. I kind of sense you want to say something.

Mr. Burchill. No. I just agree with you, that this may be the first and not the only such entity despite the large sums involved. I believe many programmers already servicing cable would welcome this as another additional distribution opportunity to broaden their potential audiences.

Mr. Mooney. May I add one thing? They are not going to have to pay Montgomery County 14 percent at the top.

Senator Packwood. No. That would probably be unconstitutional for Montgomery County to try to do that.

Tell me a little bit now about rates. The argument is they have gone up dramatically over the last five years, and I say this as an absolute babe in the woods. I never had cable until two or three months ago, and I pay $17 or $18 for it. It seems to me a pretty good deal because I can watch the news on the Baltimore stations, which comes on at a different time than the news here, and it is convenient for me.

Mr. MOONEY. There is no question but that basic cable rates went up significantly over all during the first two years subsequent to deregulation, and we think that was not altogether surprising since during the 14 years prior to deregulation we had run 72 points behind the CPI as a consequence of the city councils holding our rates down. 1989, however, was the third year you saw those rates level off.

Again, we have every reason to believe that they are going to stay pretty much within the overall rate of inflation in the consumer economy. When you are in a situation where, as Mr. Hostetter is suggesting, that he is selling only to 57 percent of the households that can take the service and the other 43 percent do not, you have a very powerful disincentive to raise those rates very much at all beyond sheer necessity because every time you raise that rate you are further disincenting the other 43 percent of households to whom you are trying to sell.

Senator PACKWOOD. Did one of you say it is only 37 percent in the District?

Mr. MOONEY. I did.

Mr. HOSTETTER. Senator, may I give a somewhat longer view on rates? The first systems we built in northwestern Ohio were turned on in 1964, and we charged $4.95 for a nine-channel service. If we simply increased those rates to keep up with changes in the Consumer Price Index, if we charged exactly the same, constant dollar amount, the rate would come out to be something in the range of $20.

Our actual basic rate companywide average is $16, so we have lowered our rates by about 25 percent, and our average system now delivers over 30 channels. So we have increased the service by threefold and in real dollars lowered the rates by 25 percent over a 25-year period.

Mr. MOONEY. There is one other thing you ought to know about rates, too. Subsequent to the Cable Act, a lot of cable companies for purposes of marketing simplicity discontinued the lowest priced tier of service and went with just one big tier of basic service. For those people who had been subscribers to the smaller tier——

Senator PACKWOOD. The smaller tier was, what, four or five channels or the networks carried on cable or something like that?

Mr. MOONEY. It was the "must carries", the local broadcast signals, plus the local public and educational access channels and so forth.

Senator PACKWOOD. That would have been the lower tier?

Mr. MOONEY. That is right, and a lot of companies discontinued those lowest priced tiers, with the result that people who had subscribed to that service and who wanted to stay on the cable all of a sudden had to buy the big package and in that sense experienced very large rate increases.

I think that it is understood in our industry now that it was probably a mistake to do that, but that is the antecedent of a lot of the horror stories you have heard expressed at various hearings both here and in the other body. It is the discontinuation of that low priced tier.

Senator PACKWOOD. The staff draft would reimpose rate regulation on the cable industry and would expand it to include advertiser-supported program services.

In your judgment, what impact would this have on program development?

Mr. MOONEY. I think it would have a very severe impact on program development. I think that the existing programmers would be the first to feel the effects of that, and I think it would stop dead in its tracks the creation of new cable program services.

You can read in the trade press now every week articles about various "new ideas" for program services being held in abeyance because they do not know what is going to happen and they are afraid of rate regulation of those services, which incidentally would be to go further than the FCC permitted prior to the Cable Act.

Mr. BURCHILL. Senator, we have just such new concepts on the table at our company on hold because of the current environment.

Senator PACKWOOD. Now let me ask you further. The draft would prohibit cable programmers from entering into exclusive arrangements with cable operators. What effect would that have on programming?

Mr. BURCHILL. Well, if I can answer that, we have a nonexclusive policy, but I feel that the best solution is a marketplace solution. If other companies choose to have an exclusive policy, it is only a matter of time before potentially the marketplace in terms of distribution tilts towards those who have had a nonexclusive; and maybe those who have been exclusive would change their view because they feel that we are becoming more widely distributed and more competitive to them.

So I think it is very much a marketplace solution that is the ideal, and that is how access should be determined.

Mr. MOONEY. May I add something to that? You know, there is a large body of antitrust law to the effect that if you use exclusivity agreements to such a degree that they impede people from entering markets you have a bad antitrust problem.

On the other hand, it has been common not only in the entertainment industry at large but in the TV industry to rely on exclusive distribution deals as legitimate competitive strategies.

Just last year the FCC reimposed the Syndex rules, for example, which guaranteed broadcasters exclusivity within their local markets, and we think it would be ironic, indeed, if the broadcasting industry is allowed to continue to preserve its own exclusivity, for example, not only for syndicated programming but also for networks, but we were prohibited from doing the same.

You know, NBC says it is exclusively a broadcasting network, and they will make only one deal with each TV station in town. If, while that situation persisted, the government were all of a sudden to deny us the ability to pursue that same kind of competitive, strategy, not to excess, not to the point of denying entry to others but, still, it is something that is going to be increasingly important to us as our world grows more competitive.

Senator PACKWOOD. My last question is, what do you think about "if carry/shall pay?"

Mr. MOONEY. I think it is really "if carry/must carry/shall pay." I think it is primarily a way for the broadcasters to get some more money.

You are talking about local signals here. I mean, I live in Washington. Channel 4 is obligated to serve me. If I choose to employ a community antenna system to enhance Channel 4's picture, then I ought to be able to do that without effectively having to pay, through the cable operator, Channel 4 and NBC money for the privilege.

You know, the broadcasting industry for 30 years, indeed as recently as last October, has pushed for "must carry" rules, and for most of that 30 years they had "must carry" rules. There resulted a pattern and an expectation by the consumer of the local cable systems carrying local broadcast station signals.

For the broadcasters all of a sudden now to turn around, never acknowledging that there ever was such a thing as a "must carry" rule, and say that we have been thieves for 30 years and demand payment I think is not only remarkably cynical but, in terms of its likely impact on cable pricing, brutally anti-consumer because the consumer would be paying more and getting not an ounce of additional television.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Breaux.

Senator BREAUX. Well, cynicism is not new in the city. Let us talk about the subject of which Senator Packwood was just speaking from the perspective of selling things.

Obviously, the cable systems sell the programs. You advertise them. You sell the networks product. You sell the fact that you can show ABC, CBS and NBC.

What I think is troubling in theory is that all of these other programs that you carry over cable, you advertise you pay somebody for that product; but it seems to me that when you sell the networks' signal through the cable system, you pay nothing to the networks who are producing that product, and yet you are benefitting from the sale as part of your revenues.

You advertise, I think, extensively that the most popular product on the cable system is the network signal, and so you advertise it, you make money off of it, and yet in theory or in fact you pay nothing for the product.

What is the response to that?

Mr. HOSTETTER. Well, let me try and simplify it a little bit. I would be happy to have a marketplace system apply here, and to bargain individually for broadcast channels that we carry. In some cases we might end up paying them, and in other cases we might get paid—this is certainly the situation with the existing network broadcast structure—the network pays the local distributor.

Where the so-called must carry, must pay falls down is that it allows the local stations in any market to say all or none and essentially confront you with a tied sale.

Senator BREAUX. Then you do not object to some mechanism being worked by the cable operators to, in fact, in some cases pay the networks——

Mr. **Hostetter**. But I want to be able to deal with them one on one. I do not want to be confronted with something that violates the anti-trust laws.

Senator **Breaux**. Yes.

Mr. **Hostetter**. It is a simple matter. What is happening here is that the broadcasters are seeing money go to support alternative programming. And they are seeing their own revenue stream start to be impacted, because their viewership is impacted.

And the arrogance of this response is absolutely shocking to me. If they want to play the game this way, I will play it this way, but I am not going to give them anti-trust exemption. If Turner Broadcasting came to me and said, you are got to carry all five of my services or you cannot carry any, I would go to my anti-trust counsel and have a lead-pipe synch against them. It is a tied sale.

Senator **Breaux**. So what you are saying is that you are not objecting to negotiating, but it should be one by one.

Mr. **Hostetter**. One by one. They cannot come to me in concert and say, if you take one of us you must take all of us.

Mr. **Mooney**. Under anti-trust law, unless you had legislative cover for that, that would be an illegal tying arrangement. And this thing in a way is legislative cover for an illegal tying arrangement.

Mr. **Hostetter**. Now the simple facts of this are that if they cannot make us take all of them, the coalition, the so- called unity among the broadcasters on this subject, absolutely goes up in smoke. Because the stations that we would want are the stations that are doing significant amounts of real local affairs and news programming in their local communities. And by and large those are not the independent UHFs.

Senator **Breaux**. So you suggest a mechanism which would allow negotiations between the cable owners and the broadcast networks that would be fair in your opinion?

Mr. **Mooney**. Sure.

Mr. **Hostetter**. Simply say, there is no must carry. And that these stations cannot negotiate in concert. They have to negotiate individually.

Senator **Breaux**. Okay. Let us talk about the position of the Telco Telephone Co.——

Mr. **Burchill**. Senator, if I can add one small point to your last issue.

Senator **Breaux**. Sure.

Mr. **Burchill**. That would be that most satellite programmers, cable channels would welcome such a marketplace opportunity, because that would potentially open an awful lot of attractive channel 2 and channel 4 positions for us to also compete for, which we cannot now.

Mr. **Mooney**. I think I should say, Senator, that while my friend Mr. Hostetter has got an intellectually coherent position and one which if we were put to the choice, we would adopt rather than this must pay, must carry deal, there is enormous potential in this thing for consumer frustration and perhaps even real outrage. People are used to sitting there with that T.V. set and just dialing through all those channels without distinguishing between the local stations and the cable signals. And if all of a sudden those local stations started to disappear in their entirety, or one by one, I think you would probably start—we would all be pretty uncomfortable.

Senator BREAUX. Would not that be the consumer demand? If they demand that service, would you not feel like it would be in your interest to purchase the program and——

Mr. MOONEY. Yes. But what we think that what we are providing here is a local antenna service and we do not think it derogates at all from the interest of the local T.V. station or for that matter, its affiliated network if we provide a service to the consumer, which both cleans up the signal of the local T.V. stations and in many instances extends its reach. We think that the position they are taking now is an opportunistic money grab driven by the fact that they are finding the world to be somewhat more competitive than the one they traditionally are used to.

Senator BREAUX. I mean it is clear—the money grab thing is clear that your companies sell, market and receive income from broadcasting over the cable their programs.

Mr. MOONEY. But so does the guy who does T.V. Guide or the guy who sells local antennas, or for that matter, the guy who sells T.V. sets.

Senator BREAUX. Maybe that is another problem we ought to address. But I am talking about with the cable companies, you are in fact selling their product and getting revenues for it. I mean it is factual, is it not?

Mr. HOSTETTER. I think the point that is missed is——

Senator BREAUX. How about my question?

Mr. HOSTETTER. The networks pay the local distributer to distribute the local broadcast station to carry their network shows and the national advertising with it. If you left it to a free market system, there would be some stations that would be happy to have the cable carriage, which they have historically had for decades and feel that they are getting more than their fair share of the bargain.

If you want to change it to a market system, then give us the protection of the anti-trust laws which anyone would normally have.

Senator BREAUX. I have no problem with that.

Mr. HOSTETTER. And if that is the system you want, I frankly have to say—just so my position is not misunderstood—I think that the mandate of the Communications Act in terms of the broadest possible reach for locally licensed stations should control.

And I think a better way of dealing with this problem is to go forward with a sort of must carry program that the chairman and Senator Danforth have each incorporated in their respective bills.

I mean, I think must carry is an important dimension of our national communication system. It reinforces the localism, which is the underpinning of that system and is an appropriate relationship with cable companies. But when this new proposition is raised, I simply say to you, scuttle must carry and I will live with the market system.

Senator BREAUX. I am really trying to get to another area. Let us talk about the opposition to the telephone companies entry into cable. Some would argue that allowing the telephone companies to be a common carrier not to own programming is a means of trying to provide perhaps some competition or perhaps a better delivery system, depending on what the consumers think when they have another choice.

What is the objection from the cable systems position on this proposal?

Mr. **Mooney**. We do not have any objection to that at all. Telephone companies do today build plants and operate them as common carriers. The C&P Telephone Company owns the cable system right here in Washington, D.C. and operates it on a common carrier basis—on a carrier basis at least leasing it to the firm that has the local cable franchise.

So that is current law. They can do that now and indeed do it all the time. What I think the phone companies would like to do, however, is precisely to escape the common carrier restrictions. And we have two basic objections to that.

The first is that, we think telephone companies are uniquely able to use their rate of return telephone business, which is in a general sense a cost-plus business, to cross-subsidize unregulated ventures.

And we do not think that governments at any level can really effectively police that. I mean NYNEX just got caught cross-subsidizing to the effect of $115 million, which they are going to make them give back to the consumers. But that says nothing of the injury that was done to other non-phone company businesses they were competing with.

Second, if you read what the phone companies put out and listen to what the phone companies tell each other in their internal deliberations, their vision is of a world where there is one wire handling not just telephone traffic but supplanting the existing functions of broadcast over the air television and cable television.

And they want to have not only that one wire but also want to be programmers on it. The chairman of Bell Atlantic said that in an interview in one of the trade press magazines within the last two months. And we think that that kind of situation, in which they aspire not only to control the entire transmission path but get into content is something with implications that go way beyond cable television, or whether people have problems with the existing cable television industries.

Senator **Breaux**. So you have no problem with them acting as a common carrier, but what?

Mr. **Mooney**. If their lessees have to fulfill the same regulatory obligations that we do, I do not think we could have a legitimate objection to it. We may not—privately—we may not care for it. Nobody wants any more competition than he has to have, but I hardly know what we would say if we tried to come up here and oppose it.

Senator **Breaux**. Okay, my final question is, the statistics that we have had presented to us with regard to the price increases, one study shows that the lowest price basic services had increased by 29 percent from December 1986 through October 1988.

A comparison indicated that the most popular basic cable services the price had increased by about 26 percent. Some cable industry folks have pointed out that the most telling statistic is the price per service, which was $.47 a month prior to deregulation and $.48 after.

What are we talking about there? I do not understand the price per service category?

Mr. MOONEY. Price per channel.

Senator BREAUX. Per channel? So you have more channels therefore——

Mr. MOONEY. What that suggests is that as the price of basic service rose so did the number of channels provided.

Senator BREAUX. Okay, thank you. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Burns.

Senator BURNS. Thank you, Mr. Chairman.

And I would imagine, are you not glad we have got good chairs. Are you guys about wore out down there?

First of all I want to thank Mr. Mooney for his frank discussion on this and on this subject. And I know it is a long drawn out thing. And I will not hold you any longer, and you can tackle it any way you want to.

I know there is some opposition to the Telco entry into the cable business as you are. And we keep hearing by permitting cable to compete with broadcasters, we have seen some new services emerge. Why could we not expect the same thing happen if Telco was to be permitted into the cable business? Or is it just that you have got yours and you want to hang on to it and not face that competition?

Mr. MOONEY. No. Senator, we ourselves had a history of being suppressed, openly and overtly by the Federal Government which at one time followed a policy which effectively announced that broadcasting was the chosen technology for doing T.V., we should not be allowed to be a programming medium in our own right. This lasted up until about the early 1980s.

So we have a built-in distaste for trying to use regulatory restraints to keep other people out. When the dish industry went to the FCC, for example, in 1979, we were not there opposing their deregulation. And when the MMDS or wireless cable people got some benefits from the FCC about five years, we did not oppose that. And today there is another wireless cable proceeding going on down there to help them shed their own regulatory restraints, and we are not opposing that either.

Telephone companies, though, are unique. Their economic, regulatory and psychological structure creates a very strong, indeed, apparently irresistible incentive for them to cross-subsidize their unregulated ventures, simply because they can take expenses, and just pack them into the telephone rate base. And the state public utility commissions are going to let them get all that back plus a profit from the telephone subscribers.

And because their businesses are so massive and so complex, governments have not yet invented effective techniques for monitoring and preventing that. We think it is appropriate for businesses so powerful as phone companies, so ubiquitous, they have about 95 percent penetration of all households in the United States, to be constrained as common carriers.

In return for their uniquely powerful—for the uniquely powerful status they gain as a result of their phone monopolies, they're treated as common carriers. But you know, if they want to go out and build a video plant and operate it as a common carrier, so long as the people they lease it to are not in a better regulatory situation vis-a-vis the local governments, we can have no legitimate objection.

Senator BURNS. You made the argument though years ago for your survival in the cable business, you made the article that vertical integration was a necessity. And why would not that argument for a competitor be the same?

Mr. MOONEY. Oh, a lot of our competitors are vertically integrated. If you look in the broadcasting industry, for example, you will an increasing number of companies that are vertically integrated all the way up to and including actual program creation.

The Fox Company, for example, is a movie studio, a string of broadcast stations, a network all at the same time, as well as related to a parent company that is in the newspaper business and so forth. And this is characteristic of most of these industries. We have no objection to it.

Telephone companies, however, again, because of their unique economic status and their unique regulatory status—this rate of return thing, where they can just pack all those expenses back in and nobody has really been able to monitor it and prevent them from doing it in an untoward way, sets them up as a unique danger to competition.

And we are not the only people that feel that way. If you carefully analyze even what the broadcasters say, the broadcasters want them kept out of the programming business and the retail programming business. They want them constrained as common carriers.

All of the existing media industries take that position because they are well aware of the potential. And indeed the very long history of phone companies shows them to be seemingly genetically unable to be constrained by even the anti-trust laws.

Senator BURNS. Well, I will ask the broadcasters when they come up here, if I can outlast the rest of you.

Mr. Hostetter, do you really view DBS, the Sky Cable as a viable competitor or yours, as it has been talked about in the papers?

Mr. HOSTETTER. Yes. Significant. And if I was not worried about it, my financial sources—would bring it to my attention.

Senator BURNS. Well, if I could put your banker at ease in saying that probably the most important reason people sign up for cable is not maybe those other services but it was to improve the signal and to have access to local broadcasters a better signal. That is sort of an accepted argument. Is it not?

Mr. HOSTETTER. I think that is one of the reasons people subscribe to cable.

Senator BURNS. Okay. I say it was probably the main reason, because they watch those channels more than they do any others, and I am wondering how DBS is going to deliver a local signal.

Mr. HOSTETTER. Well, they will not deliver a local signal. They will deliver a signal locally, but it will not have a local component to it, if that is your proposition. But I think if you look at what has happened in the evolution of broadcast regulation, there is less and less real local programming going on, on many broadcast television stations.

So, it is not inconceivable to me, five, eight or 12 years hence that the networks elect to be distributed by satellite and could very well decide that Sky Cable is their natural distributor.

Senator **Burns**. I do not think I would subscribe to that system, if it did not have local news and sports and features of local interest as the over-the-air broadcasters provide for a community now.

Mr. **Hostetter**. When I think about what my competitive responses are going to be to this now-clear competitor in the middle of the next decade, we are putting increased emphasis on local programming. We are trying to get good at doing what the broadcasters are year by year defaulting on, which is covering in an in-depth manner local issues, local news of interest to the particular communities that we are in.

You know, we have a big leg up when we are programming a channel for Cambridge, Massachusetts or Arlington, Massachusetts which are contiguous but have very different interests compared with a VHF station there who is covering those and 180 other communities.

So part of my competitive response is simply going to be to dig in and get very good at the community relations and community programming that I think will be one of my lines of defense in the next decade.

Senator **Burns**. Would that mean that you are going to try a lot harder to come up with some sort of a solution in what you folks have been going through with the local broadcaster now? You have been in negotiations and this type of thing?

Mr. **Hostetter**. I sure would like to. But it seems to me this recent proposal, today's announced proposal, is an absolute right turn in those discussions. It is totally contrary to the efforts I have seen over the last few years by the broadcasters to improve their relations with local cable companies.

Senator **Burns**. I want to thank all three of you for coming today. I appreciate your time, and I sure appreciate your answers and being frank with us. I appreciate that very much.

Senator **Inouye**. Senator Exon.

Senator **Exon**. Thank you, Mr. Chairman.

I was here a few years ago when we recognized that cable television was something that needed help, and now you have been so successful that we are back taking a look at whether or not you have become such a monopoly that we need to make some corrective legislation.

I have an open mind on this, but it is a matter that we are going to discuss. I suggest, as others have previously and as I think maybe some of you have indicated, that we are going to have some type of legislation.

With that in mind, let me ask you a few questions to try to see what type of a bill we should pass for the assistance of this one, Senator.

First, let me ask you, generally speaking on the monopoly issue, how many cities in the United States are there as of now that have competition, more than one wire cable franchise, at least two? Is that ten cities, 20 cities?

Mr. **Mooney**. It is about 95.

Senator **Exon**. About 95 cities.

Mr. **Mooney**. Yes.

Senator **Exon**. Those 95 cities would be about what percentage of the market?

Mr. **Mooney**. Quite small; very small.

Senator **Exon**. Well, then, we can conclude that, to a large extent, it is a monopoly right now; is that correct?

Mr. **Mooney**. Well, you can sure conclude that there tends to be only one in each place.

I think, Senator, you were not here for the earlier exchange I had with Senator Danforth in which I said I had just about given up arguing on that monopoly thing.

Senator **Exon**. Let me proceed a little bit further. We are going to hold a hearing, I believe it is next week sometime, on the matter of the telephone companies coming in with fiber optics. It seems to me that there are a lot of very positive things that might happen with regard to fiber optics, and then there are some things that might not be so good.

I try to look over the horizon a little bit to see what we would have in the future because I suspect that there is quite a lot of entrepreneurial interest today in seeing how many wires are going to be run into the homes of Americans and what can be carried on those wires.

If I had the only wire and controlled the company of the only wire going into the homes of Americans today and over that wire I could get almost everything, telephone and cable television—and I salute you, gentlemen. I think you have done a very, very fine job overall in America for providing lots of entertainment and information to an awful lot of people, and from that standpoint it is very good and very positive.

We do have some complaints from time to time, though, Mr. Mooney, whether you call it a monopoly or not. One of the reasons that we are getting the suggestions from the city officials today is that the cable rates have gone up above and beyond what could be described as a fair return on their investment, and that is one of the reasons that city councils would like to regain some measure of control so that they could protect the consumers in that interest given the fact whether you want to call it a monopoly or a sole source situation that we have today.

Do you believe that there is any merit to the suggestions by the city councils and mayors that we should give them some control in this area? At least as of now there significantly is no competition to have the free enterprise work.

What is your answer to that, gentlemen? Any of you may respond.

Mr. **Mooney**. I think that if you are to reintroduce regulation of cable rates, the worst thing to do is simply put it back into the laps of city councils.

Now there are a lot of things that I guess that city councils do well, but regulating rates for anything is not one of them. Regulation is a word we normally associate with the activities of quasi-judicial bodies like the FCC which operate on the basis of a coherent intellectual theory and in the context of administrative procedure statutes and so forth and which are intended to deliver up expert dispassionate judgments on matters, among other things, such as rates.

City councils really do not do that very well. They tend to be and are political bodies. They tend to be tumultuous. What politician ever likes to vote for an increase in the rates of anything?

So I think that to the degree that the Congress decides that the right thing to do here is to reregulate some quantum of cable rates, it ought to involve a set of rules made at the Federal level and, in my opinion, at least, which ought to operate as automatically as possible.

Senator Exon. Obviously the FCC would be the logical agency?

Mr. Mooney. That is correct.

Senator Exon. Do you care to add anything to that?

Mr. Hostetter. I guess I would only add that I think there is no indication here that, monopoly or nonmonopoly, there have been or are excess profits being earned by the cable companies. I guess it is just a shorthand for it.

I look back preregulation at the states which regulated cable, where there was presumably the expertise to determine what was an appropriate return on investment and what were the allowable expenses and, therefore, what the appropriate rates would be: States like Connecticut, Rhode Island, Vermont, Alaska and Hawaii, to name a few.

If you looked at the rates allowed in those states before Federal deregulation, those rates tended to be higher than applied elsewhere in the United States. So I think the people who were expert in making determinations about what are appropriate returns on investment, i.e. the states, were much more forthcoming with cable companies than the municipalities were. I think that is an indication.

If you take those old rates and simply trend them by inflation over the period since deregulation, which is what has in fact been the case, I think there is no indication here of excessive profits.

Senator Exon. Gentlemen, have you been in the industry long enough to remember this? I think I remember correctly that they were sold out in our area, at least. In the days of infancy of cable television that this was really going to be a big boon because you are not only going to be able to get a wide variety of programs but you are also going to help out with taxes, that this is going to be a great moneymaking revenue source for the cities.

You remember those days, do you not? That did not work out very well, did it.

Mr. Hostetter. Well, it depends. I think we have been a significant source of revenue for the cities. My recollection is last year the industry over all paid [illegible] franchising authority something over $500 million.

Mr. Mooney. It was $750 million.

Mr. Hostetter. Senator Dirksen might have found a way to make that unimportant, but $750 million to me is a big number.

Senator Exon. It is a pretty big number to an awful lot of us.

I suspect one of the reasons some of the cities might like to get back into this is if they think they might be able to alleviate the pressure for more revenue rather than raising taxes.

Do you think that is a factor with the cities?

Mr. MOONEY. I think the truth of the matter is that there are not that many cities that are very interested in regaining rate control. The National League of Cities at its recent meeting in Washington did not include the cable television issues among its listed priorities and at the same meeting apparently severed the relationship between themselves and the National Association of Cable Regulators, saying that they were not all that interested in that subject.

I think that apart from a relatively small number of people you do not have too many people in that community who really want to get back into the rate business. I do think that if they got a whiff of anybody trying to cut down on the money they get out of this thing, then you would see some real interest on a broad basis.

Senator EXON. Gentlemen, back to the matter of fiber optics, because that is going to be a big, big issue.

The staff draft requires the FCC to issue rules limiting the horizontal and vertical ownership. The FCC also is required under the staff draft to issue rules on maximum number of cable channels that can be occupied by a programmer. The original Danforth Bill went somewhat further because it put some specific limits into the law.

I know you all have some concerns in those areas, and I am looking at them very carefully. Could you generally comment? I assume that you, as the cable industry, would prefer the staff draft over the original Danforth Bill; is that correct?

Mr. MOONEY. Not necessarily. It all depends what part of it you are talking about. There are some instances where we prefer A from one bill and B from the other, and some instances where we cannot stand C in any way as it appears in both.

Senator EXON. Are you telling me that if you had to take one or the other you do not care to make that choice now, Mr. Mooney; is that right?

Mr. MOONEY. I sure do not, not today. I want to feel my way into this.

I think I should say, too, that horizontal concentration is an issue that affects only one or two companies, and while I think they would prefer not to have the FCC directed to do anything in this area at all, I think, too, that they would rather it be handled at the FCC than to try to pick a number here.

On vertical integration, it can be a good thing or a bad thing in any industry. It can be a good thing if it stimulates the creation of additional products and services. It can be a bad thing if it is used to lock other entrants out of the market. I think that most of the hard statistical, empirical evidence which the committee has in its record is that to this point in cable it has been more of a good thing than it has a bad thing. Indeed, it is hard to find any hard evidence at all that it has been a bad thing.

So if there nonetheless is concern in the committee about that, I would urge you to put it with the FCC but with some clear directives that in a lot of instances vertical integration has allowed for the creation of programming services that nobody else wanted to put any money into.

Senator EXON. Gentlemen, thank you very much.

Thank you, Mr. Chairman.

Senator INOUYE. It is my turn, now. Most of the questions that should have been asked have been asked, but I would like to ask one just for clarification purposes.

We are all aware that we are here for a great part because of the rates. I have here before me a study which indicates that, notwithstanding the fact that the Cable Act limited the fee to 5 percent of the gross, there are other costs. In this study it is referred to as nonprice franchise concessions.

As a result of these nonprice franchise concessions that cable systems have to make if they are going to get a franchise, it says here that the cost attributable to such concessions range anywhere from 20 to 30 percent. That is in addition to the 5 percent gross.

Is there any truth to this report?

Mr. MOONEY. Oh, yes. That would comport with a study that we did prior to passage of the Cable Act in which I think it was shown that, on average, 22 percent of cable system revenues were going in the form of cash and things of value to the franchising authorities. Since the Cable Act did not essentially change any aspect of the ability of franchising authorities to extract these concessions—indeed it raised the franchise fee cap from 3 to 5 percent—I have no reason to believe that that pattern has changed at all.

Senator INOUYE. Another study indicates that for the most part the franchise will not permit the cable company to list as a line item these costs in a bill that you submit to the subscriber; is that correct?

Mr. MOONEY. That frequently is correct. I do not know if there is any well-established pattern of behavior among local jurisdictions on that score. The Cable Act says that we are allowed to list the franchise fee as a separate item but is silent as to other items. I have heard of a few instances where that is correct, but I cannot say that I know that it is broadly correct.

Senator INOUYE. What is the practice in your organization, sir?

Mr. HOSTETTER. To my knowledge, there is no place where we break those costs out. We are trying to maintain good relationships with our franchising authorities who, in the final analysis, are responsible for our renewals. I think it would be embarrassing to them to have us identify the costs that were attributable to the regulatory scheme.

Senator INOUYE. So the subscriber believes that the cost is profit?

Mr. HOSTETTER. The subscriber thinks it is going to us and does not understand that we then have to turn over a large portion of it to the franchising authority.

Senator INOUYE. Naturally, as businesspeople you are going to pass on these additional costs to the subscriber?

Mr. HOSTETTER. To the extent we can without losing subscribers, which of course eventually happens.

Senator INOUYE. Is that the practice with your organization?

Mr. BURCHILL. Well, we are not in the practice of billing subscribers, Senator. Clearly, I think the cable operator in these price increases that have been discussed is not getting full credit for the programming investments and upgraded value of programming that are inherent in some of the price increases. They are either absolute comparisons or cost-per-channel comparisons but do not really significantly reflect.

I think the cable industry has done a disservice by not really being connected to the programming that he is providing through the medium of the fee support that they provide to networks. It is a perception versus reality issue.

Senator INOUYE. So it is conceivable that many of these subscribers do not realize that the increased cost to them may be attributable to these nonprice concessions?

Mr. MOONEY. That is correct.

Mr. HOSTETTER. Not only conceivable; it is likely.

Senator INOUYE. You have been with us now for three hours, which is quite unusual for any witness. I thank you very much for your patience, and I wish to commend you for your responses. I think it is most helpful to all of us in this process.

I have many other questions that I would like to ask, but the hour is late and there are other panels. So I may submit them for your consideration and response.

Mr. MOONEY. Certainly, sir. We will reply in writing.

Senator INOUYE. Now the second panel.

May I call the President of the National Association of Broadcasters, Mr. Edward O. Fritts; and the President of Association of Independent Television Stations Incorporated, Mr. James Hedlund.

Thank you very much, Mr. Fritts, and Mr. Hedlund for your patience and waiting for us. May I now call upon Mr. Fritts.

STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman.

We appreciate this opportunity to appear here today as the committee prepares to move forward on badly needed cable reregulation legislation.

The cable industry's growth in the past decade has been truly phenomenal. Now in considering cable we are no longer talking about a small, struggling infant industry that needs coddling. We are talking of a major economic force fully able to pay its pay in the American media marketplace.

To put it bluntly, Mr. Chairman, cable has grown and flourished over the past decade under what might be called a free lunch program, which has been supplied gratis by America's broadcasters.

What I am here to say today is that with the enactment of this legislation, the day of the free lunch for cable will be over. Cable has become an unregulated monopoly with overwhelming power. You know it, we know it, your constituents know it.

As a result of testimony at numerous hearings on this subject the leadership of this committee has stated publicly that it will move forward with a cable bill. So the time for action is now. And you have seized the initiative with these final hearings on cable legislation. What kind of cable bill will the subcommittee approve? Well, let me address that issue squarely.

I think you could consider two approaches. First the committee could push for more competition for cable—as has been discussed here today. But fiber optic service and broad band digital networks, quite frankly, are at least a decade away or more.

Now DBS is being trumpeted as a likely competitor, but they have been singing that song since 1980. If the current DBS proposals were to mature on time, our best analysis is that they would garner only 5 percent to 10 percent of the market. And, of course, we all know MMDS is still in its infancy. But if all of these services were to grow to their fondest expectations, combined they would still not be able to compete effectively with cable.

The second choice is the staff draft, which your committee has created. This draft with some minor exceptions, we think, is an outstanding piece of legislation. Were it to pass today, it would be truly one of the landmark communication laws ever written.

We particularly applaud its must carry and channel positioning provisions. We like the idea of centralizing rate regulation, the redefinition of basic cable service, and most importantly, the new definition of effective competition.

The current definition of three broadcast signals, quite frankly, is a joke. As your colleague Senator Joseph Lieberman pointed out last year, cable's claim that it faces competition from but a handful of broadcast stations available in most areas is like a railroad baron in the 1800s claiming competition from the Pony Express.

We share the committee leadership's view that since broadcasters face vertical and horizontal integration controls, cable ought to as well, although we do have some concerns about some of those specific provisions. And for those who seek competition as part of the future answer, we support the draft's carefully crafted limitations on Telco entry into video.

Simply, Mr. Chairman, we think this legislation provides the right balance. That is, it provides appropriate regulation and looks ahead to a more competitive world.

We also want to suggest an amendment to the staff draft which we are convinced would make this good legislation even better. Yesterday the chairman introduced, by request, Senate Bill 2357: The Cable Subscriber Protection and Broadcast Retransmission Act of 1990. Known as "if carry/shall pay," this plan provides a fair system for compensating broadcasters for the signals that cable uses to build its video empire.

Cyril Vetter and Jay Kriegel will describe this proposal when they testify later in this hearing. But let me say quickly that I urge you to give it serious and thoughtful consideration. The time to bring sanity and equity back into our video marketplace is now.

You have heard the testimony of dozens of witnesses over many months. We stand ready to work with you to help shape a bill that will return fairness to the marketplace and which will end once and for all cable's free lunch.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF EDWARD O. FRITTS, PRESIDENT & CEO, NATIONAL ASSOCIATION OF BROADCASTERS

I am Edward O. Fritts, President and CEO of the National Association of Broadcasters. NAB represents 975 television stations, the major networks, and more than 5100 radio stations. We appreciate the opportunity to testify today concerning regulation of cable television.

Introduction

Let me start by saying that NAB supports the thrust of the Committee Staff Draft of March 9, 1990. We believe that it recognizes the central fact of today's video market -- that cable has grown from an "antenna service" to a "gateway" provider of video programming with no true competition. Moreover, this monopoly position has been obtained and secured by federal policies which permit cable systems to get their most valuable product -- local off-the-air broadcast signals -- for free, to have no corresponding carriage or channel position obligations, and to raise prices at will. We think the bill goes a long way to redress this imbalance.

Later today, you will hear from Cyril Vetter, a member of NAB's Television Board, about another proposal -- the if carry, must pay plan -- that complements the staff bill.

Before making any detailed comments, I want to acknowledge that, despite our concerns with cable's monopoly position, NAB accepts the fact that the cable industry is and should be a full-fledged competitor for broadcasting. Cable has helped to spread television reception to unserved and under-served areas. Cable has created numerous unique services and niche programming which could not be made available in most markets through a medium solely supported by advertising and directed to the broadest possible audience. These things serve the public good, and future fair competition between broadcasting and cable can bring more benefits to the American public.

But the public benefits only when competition results in more and better services at lower prices, not just in changing the way existing services are delivered. And competition cannot function when one of the competitors has a built-in competitive and regulatory advantages over the other. These problems unfortunately characterize the relationship between broadcasters and cable today, and unless changes are made, they will result in a spiralling deterioration of free over-the-air video services to cable subscribers and non-subscribers alike.

No doubt you have heard and will hear from representatives of the cable industry that all these changes are unnecessary because broadcasting is thriving. For the most stations, I am happy to say, it is. But stations in many markets are already suffering. Moreover, the Congress' concerns must be with the future, and the future of the free over-the-air broadcast system is troubled indeed.

The Advantages of the Cable Monopoly

Cable television today is an unregulated monopoly. It is a monopoly because for almost all consumers, one local cable system is the only way they can get cable programming. It is also a monopoly because it is the only way for broadcasters and programmers to reach cable subscribers -- what the economists call monopsony power. When Congress passed the Cable Act in 1984, it was not troubled by this situation because, (1) the FCC's "must carry" rules were then in place requiring cable systems to carry almost all local television signals, and (2) Congress had been assured by cable that broadband competitors would rapidly develop. As you know, little more than a year after the Cable Act passed, the must carry rules were thrown out by the courts, as a result of suits initiated by cable. Competing delivery systems to cable have not emerged and cable overbuilds are virtually nonexistent.

The resulting situation poses great danger to the American system of free over-the-air broadcasting. Cable systems have no requirement to carry any local television signal. They can, and increasingly do, drop or refuse to carry local broadcast stations or demand payments or other concessions from broadcasters in exchange for carriage. For example, more and more cable systems are demanding that television stations waive their rights under the FCC's syndicated exclusivity or network non-duplication rules in order to be carried on the cable system. Moreover, even if the cable system chooses to carry a television signal, it is not obligated to carry the entire signal, and it can change the station's channel location at whim.

For example, Chris-Craft's Station KBHK-TV (Channel 44) in San Francisco was able for many years to be carried on Channel 12 on all area cable systems. Consumers who subscribed to cable knew where the station could be found; indeed it promoted itself as "Bay Area Cable 12." In recent years, some of the cable systems have repositioned KBHK, always to a higher dial position. On one system, KBHK's channel location has changed four times since 1985, often with almost no notice to the station or to cable subscribers. Obviously, this makes it almost impossible for the station to market itself, since it cannot even reliably tell viewers where to find it.

Further, the high channel positions that KBHK and other stations are moved to are often inaccessible without special cable equipment which is rarely provided by the cable operator to more than one television without additional cost. Even with a cable decoder box, accessing high channels is cumbersome without remote control, another accessory for which the cable system extracts an extra charge.

Why do cable systems drop signals and change channel positions of broadcast stations? The answer is to gain a competitive advantage. Cable systems seek larger audiences for the programming in which they have a financial interest and in which they can sell advertising. Indeed, some cable networks offer discounts to cable systems if they will place their service on a low-numbered channel between popular broadcast channels.

You will hear from representatives of cable that cable operators need discretion to select signals and change channel positions in order to come up with the most attractive program mix for the public. The fact is, however, that, with almost no exceptions, the lowest rated off-the-air signal in any market attracts more viewers on the cable system than does any cable program service, and often more than all cable services combined.[1]

A new and perhaps even more frightening development has recently occurred. The ATC system in Rochester offers an ersatz television station -- programmed like an independent broadcaster, identifying itself with broadcast-like call letters, and competing with local independent stations for advertising, but free of the obligations imposed on broadcasters under the Communications Act. The station originally programmed material it bought in the syndication market, but it has now started to "cherry-pick" programming off of HBO, Cinemax and other cable services controlled by its corporate parent in an effort to build audience. Under current regulations it can go even further -- to select particular programs from broadcast stations and carry its own compilation of the most attractive programs.

---

[1] In cable households, local stations have ratings five times greater than ESPN, USA Network, WTBS, CNN and CNN Headline News combined. See Broadcasting, May 8, 1989 at 72 (citing joint NAB and Television Bureau of Advertising study entitled "Television in Transition: The Value of Broadcast Television in a Changing Marketplace").

We think that this poses a great danger to the system of free, local broadcasting. The creation of local composite channels may rob broadcasters of the hard-earned value they build through their own mix of attractive programs. It is hard to conceive how a local independent station could long compete with a local cable channel whose programming lineup included the most popular sports events off of HBO, a top-rated Cinemax movie, the most popular entertainment shows off of independent stations and network affiliates, and the highest rated local news program, all "cherry-picked" from other channels. The old must carry rules prohibited such cherry-picking of local stations' programming, and the Rochester situation clearly demonstrates why these protections are needed today.

The cable industry is proclaiming its increasing reliance on advertising revenues.[2] Yet its competitor for these revenues cannot reach the audience in cable homes, now almost 60 percent of all television homes, except through cable. By dropping or repositioning local stations, cable operators can and do seek an unfair competitive advantage over broadcast stations. And as we see more and more cable services develop, including local signals masquerading as television stations like the Rochester "station," the access of local broadcasters to the cable audience will steadily diminish.

---

[2] See Comments of the National Cable Television Association in MM Dkt. No. 89-600, filed March 1, 1990, at 43-45.

You know that advertising is currently the only source of revenue for over-the-air broadcasting, and broadcasters are entirely dependent for their income on attracting viewers. Under the compulsory license, cable pays statutorily-proscribed fees for carriage of distant broadcast signals, while it pays virtually nothing for its retransmission of the local stations' signals.

By contrast, cable has a guaranteed revenue stream from subscriber fees that is only indirectly related to the viewing of cable programs. In addition, cable operators receive revenue from pay channels such as HBO, pay-per-view service, installation charges, and equipment rental -- none of which apply to broadcasters.

As I noted, cable is now increasingly aggressive in seeking advertising revenue. Total cable advertising revenues for 1989 were estimated to be about $2 billion, up from $58 million in 1980.[3] The cable industry predicts that national and local cable ad revenues will reach $4 billion by 1994[4] and $6.7 billion by 1998.[5] For local advertising, cable systems in many areas have developed the ability to interconnect so that advertising can be sold across several systems, allowing coverage roughly comparable to that of local broadcasters. Of course, as advertising dollars shift to cable, there will be less support for broadcasters and consequently, the quality of programming available on broadcast stations to the entire public will suffer.

---

[3] Electronic Media, January 1, 1990 at 88.

[4] Wall Street Journal, December 15, 1989 at B-4. According to a recent Commerce Department report, cable's predicted 10% increase in revenues for 1990 "will be fueled largely by a rapid increase in cable TV advertising sales." Multichannel News, January 1, 1990 at 1.

[5] Kagan Cable TV Financial Databook (June 1988) at 82.

Cable's structural advantages carry over into programming. Most significantly, the most popular programs on cable, watched by 73% of all viewers in cable households, are programs aired by local broadcast stations. And for these programs which attract the most viewers to cable and thus generate the most value for cable, what does the cable operator pay? The answer under the copyright compulsory license is virtually nothing. Every objective observer has concluded that the cost-free availability of broadcast programming results in an enormous, government-mandated subsidy by broadcasters of cable.

Cable enjoys other advantages in developing programming as well. Guaranteed monthly subscription revenues, largely paid in order to watch broadcast signals and which can be boosted at will in almost all systems, form a large base for program purchases, even if the programs are not likely to have a broad appeal. A broadcaster evaluating a new program, however, knows that if it does not attract an audience, there will be no revenue to pay for it. If the cable program is popular, then the cable system gets the additional revenue from selling advertising. Is it any wonder that, with these multiple revenue streams, cable is increasingly able to outbid broadcasters for programming?[6]

This trend is most obvious today in sports programming. In the past months, we have seen more and more sports television that used to be available free over the air migrate to cable. Cable now has exclusive rights to an NFL package and more major league baseball games than are shown on the national networks. For regional sports, the migration is even more striking. The first choice in televising regional college football and basketball games is increasingly being sold to cable, with local television stations getting the leavings. The New York Yankees home games, once seen on free television, will soon be available only on cable. Shifting popular programming from free television to cable certainly is in cable's interests in attracting ever more viewers, but it may not be in the public's interest.

The Consequences of the Cable Monopoly

The result of all of this is that cable is a monopoly with growing power over its competitors. Local cable operators face almost no competition. There are 8,400 cable systems and only 60 of these face competition from another cable system. There are even fewer operating MMDS systems. It would take a very determined and well-financed competitor to challenge an entrenched local cable system which has an unfettered ability to change price and services to beat competition.

---

[6] Electronic Media recently observed, quoting the general manager of a Los Angeles independent station: "'Because [cable has] a dual revenue stream which can support [its] doing a 1.5 rating' cable will have an advantage in competition against independent stations . . . adding that if an independent station earned such ratings, 'it wouldn't be a viable product.'" Electronic Media, January 8, 1990, at 143.

Moreover, the degree of integration in the cable industry has increased dramatically since deregulation. The largest MSOs control an ever-larger percentage of the cable audience, and let me emphasize that this control places them in charge of the exclusive source of video programming for those households. The large MSOs have also become vertically integrated with program producers. Almost all of the most popular cable program services are now owned, in whole or in part, by cable operators. This combination of horizontal and vertical integration, coupled with the ongoing subsidy from broadcasters, makes cable an almost unbeatable economic force.

Cable operators are also virtually free from regulation. Only three percent of cable systems can have their rates regulated under the 1984 Cable Act and the FCC's effective competition standard. We all know the result -- since the Act took effect and local rate regulation was barred, the price for basic service has skyrocketed. Although cable has various explanations for its prices, you should remember two things: (1) During the same period, the price of pay cable services, which face competition from VCRs, declined; and (2) No matter how the figures are analyzed, since deregulation, cable has been able to dramatically boost its prices and at the same time increase penetration. If there is any better sign of a monopoly, we are unaware of it.

Even cable's service quality is almost unregulated. The FCC several years ago barred franchise authorities from imposing all but the most rudimentary technical standards on cable systems. The result: millions of complaints from subscribers and a belated, voluntary attempt by the cable industry to improve its service. By contrast, broadcasters must and do comply with a host of FCC regulations to ensure the technical quality of their signal.

A recent Wall Street Journal/NBC poll found that twice the number of consumers had negative feelings about their cable operator as about local or network television. Indeed, the only product the consumers sampled thought was a worse buy was auto insurance.[7] Despite this poor service record, the provisions of the 1984 Act mean that franchising authorities have only a limited ability to deny renewal to their cable systems.

The question before you is how to deal with the monopoly power cable has gathered -- either wait for more competition or reregulate? Although we agree that in an ideal world the creation of a more competitive environment for cable would be the best solution, the possibility of real competition developing for cable in the near term is unlikely. The cable industry still contends that a sprinkling of broadcast stations provides a cable system with full competition, but as Senator Lieberman pointed out last year, cable's claim that "it does face competition from the handful of broadcast stations available in most areas . . . [is] like a railroad baron in the 1800s claiming competition from the Pony Express."[8] Moreover, even NCTA's latest study allegedly showing that broadcast stations exercise a competitive restraint on cable operators in fact fails to show that the presence of any number of broadcast signals in a market would result in competitive pricing for basic cable service.[9]

---

[7] Why Viewers Would Like to Zap Their Cable Firms, Wall St. J., March 19, 1990, at B1.

As I noted, there are only a small number of cable overbuilds or MMDS systems now in existence. Unfortunately, we doubt whether enough of these competitors will come into existence to make a significant dent in cable's monopoly situation.

Various economists have argued for years about whether cable is a natural monopoly. Whether it is or not in theory, the fact is that local cable systems are now an entrenched monopoly in most American communities. Their plant is built and their relationships with subscribers and program suppliers are established. As you know, in many cases, the program suppliers are tied by common ownership to the large cable MSOs. A competitor to this existing presence faces great hurdles: it must obtain a franchise, often over the bitter opposition of the existing operator;[10] it must build a system and obtain programming sufficiently popular to compete with that already on the cable system; and then it must be able to take customers away from the existing system which then has the incentive and ability to drastically reduce prices to defeat competition.

---

[8] USA Today, August 9, 1989 at 6A.

[9] See Dertouzos & Wildman, Competitive Effects of Broadcast Signals on Cable, attached to Comments of the National Cable Television Association in MM Dkt. No. 89-600, filed March 1, 1990.

In comments filed in the FCC's current cable inquiry, Telesat Cablevision, a subsidiary of Florida Power & Light and an unusually well-financed and determined competitor, described the frustrations it has faced in attempting to build competing cable systems in Florida. It found that operators would reduce prices by 50% or more in the areas where Telesat was in operation. It is no surprise that Telesat was forced in many areas to give up its plans or to sell out to the existing operator.[11]

Although two companies have announced ambitious DBS plans in the last month, whether this technology can provide competition to cable is doubtful. Any significant presence from DBS is, at best, years off and subject to all of the uncertainties of any space venture. The Sky Cable proposal in particular is based on undeveloped technology. More important for your present consideration is the fact that both of these new DBS ventures are owned, in greater or larger part, by cable MSOs and programmers. Sky Cable disclaims any intention to compete with local cable systems, in fact planning to market its service through local cable outlets. At least for the foreseeable future, we do not believe that any competition for cable can come from DBS.[12]

---

[10] In Florida and at least three other states, cable operators have convinced state legislatures to pass bills imposing onerous conditions on companies seeking an overbuild franchise, conditions which the initial franchisee was never required to meet. See Cal. Gov't. Code § 53066.3; Fla. Stat. Ann. § 166.046; Ill. Rev. Stat. Ch. 34 § 5-1095; Va. Code Ann. § 15.1-23.1.

[11] See Comments of Telesat Cablevision, Inc. in MM Dkt. No. 89-600, filed March 1, 1990.

The other often mentioned source of competition for cable are telephone companies. NAB recognizes that the technology for telephone carriage of video signals will be here in the future. Before that happens, however, there are a number of economic and policy decisions to make, for there is no point to replacing one monopoly with another. Therefore, NAB opposes permitting telephone companies to purchase existing cable systems. NAB also believes that any telephone company entry into video delivery should be on a basis that excludes the carrier from ownership or control over the programming carried on the telephone cable. The difficulties which now arise from the vertical integration of the cable industry would be magnified if restrictions were not placed on the telephone companies with their immense revenue streams and the ability to cross-subsidize activities with little chance of effective regulatory control. In any event, extensive video delivery activities by telephone companies is also years off.

---

[12] An interesting perspective on the value of relying on DBS as a competitor for cable can be found by examining the hearings on the 1984 Cable Act. In 1983, the then president of NCTA confidently told a House subcommittee that near-term competition for cable would develop from a DBS venture announced by Rupert Murdoch. Now, seven years later, another Murdoch DBS venture is touted as being just around the corner. See Options for Cable Television: Hearings on H.R. 4103 and H.R. 4229 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 35 (1983).

Thus, competition for cable is at best uncertain and far into the future. To rectify the competitive imbalance that exists today and bodes ill for the immediate future of free, local television, NAB believes the only course is the reimposition of regulation on cable. To that end, I turn to the specific provisions of the Committee Staff Draft.

The Committee Staff Draft

Must Carry and Channel Positioning From NAB's perspective, the most important part of the bill are the provisions:

(1) reimposing must carry obligations on all cable systems that take advantage of the compulsory copyright license,

(2) requiring such cable systems to accord local stations either the channel position they have long held or their on-air position, and

(3) requiring that must carry stations be available on the lowest priced service tier and on all television sets connected to the cable system by the cable operator.

NAB believes that an incentive statute, where the carriage obligations are optional and in exchange for a government-mandated benefit such as the compulsory license, has the best chance of passing constitutional muster. We support the bill's elimination of a viewing standard test for must carry eligibility. We think this section of the bill is an essential first step in recreating the competitive balance between broadcasting and cable.

I have one specific comment. We believe that the signal carriage obligation should clearly require cable systems to carry all of any broadcast signals they choose to carry, so that "cherry-picking" would be prohibited as it was under the FCC's old must carry rules. We have a suggested amendment to Section 614(d)(3) which would take care of this problem.[13]

Effective Competition and Rate Regulation NAB supports the bill's recognition that the only effective competition for local cable systems is another multichannel video distributor, and we are in full accord with the bill's proposed definitions. We also think that it is essential that the definition of basic service be expanded as proposed in the Committee Staff Draft. The existing definition which includes only tiers on which local broadcast signals are carried is too narrow since it does not take into account the attractiveness of cable-only services and also provides an incentive for retiering to avoid regulation. By excluding only pay and pay-per-view services from basic service, the bill includes all services which do not now face true competition.

---

[13] We recognize that cable systems may be required by the FCC's syndicated exclusivity rules to delete some programs from a carried broadcast signal, and that those rules also permit a cable system to carry individual programs to replace deleted programs. Our amendment would not affect either of these practices.

Since cable is able at present to extract monopoly rents and undue benefits from a forced subsidy from broadcasters, we believe that rate regulation is another major step to restoring competitive balance. If cable operators no longer are able to pass program costs automatically onto subscribers, their ability to outbid any competition for programming will diminish, although as you will hear later, we believe that a retransmission fee system would have an even more beneficial effect in restoring competitive balance.

We also favor the decision to place responsibility for rate regulation with the FCC, or with franchise authorities using FCC guidelines. This will prevent the sort of abuses of rate regulation authority by local franchise officials that lead Congress to remove most of their ratemaking authority in the 1984 Act.

Vertical and Horizontal Integration The bill proposes wide-ranging restrictions on vertical and horizontal integration in the cable industry. Although NAB believes that the combination of vertical and horizontal integration we now see in the cable industry creates particularly severe competitive restraints, we also have some concerns about some of the remedies proposed in the bill. For example, broadcasters have long fought to protect the rights of video programmers and distributors to enter into exclusive relationships. This right to exclusivity forms the basis of many stations' market appeal and, of course, is protected by the FCC's recently reinstated syndicated exclusivity rules. We have doubts about the fairness of barring such arrangements for cable programming. In addition, with respect to Section 640 and the definition of "video programmer" in Section 602(26), we believe the bill should be revised to remove any doubt that the obligations extend only to programming intended exclusively for multichannel video distributors, and do not apply to the broadcast networks or other program distributors whose primary outlets are broadcast stations.

The bill also proposes restrictions on the number of systems held by one MSO, on MSO ownership of competing multichannel distributors, and on the number of channels on a system which may be programmed by the system operator or its parent or affiliates. These rules would in large measure echo the restrictions long placed on broadcasters by the FCC's multiple ownership and duopoly rules and other provisions limiting the number of "voices" which one owner may control. NAB has favored the elimination or modification of many of these rules. To the extent that they will continue to be applied to broadcasters, however, we see no reason why cable operators should be treated differently.

The if carry, must pay proposal that you will hear about later may prove to be an easier alternative to restoring a competitive balance between broadcasting and cable than some of these detailed restrictions on integration.

Other Provisions The Committee Staff Draft authorizes the FCC to require television manufacturers to include signal selector devices, known as A-B switches, in all television sets. The use of A-B switches was earlier proposed by the FCC as an ill-conceived means of reducing cable's monopoly power. NAB had concerns about its effectiveness then, and they are not lessened now. Indeed, this may be one of the few areas in which we are in full agreement with the cable industry for they also concluded that consumers do not want A-B switches, are confused by them, and are unlikely to use them. After all, since one reason many people purchase cable is to do away with the need for an antenna, a switch to permit them to use another signal source is not likely to be wanted.

On the other hand, NAB supports the bill's requirement of FCC-mandated technical standards for cable systems. Cable is now the way that most Americans receive local television programming. As technology advances, there is no reason why consumers should have to live with inferior signal standards from their cable system. Moreover, some cable systems now use state of the art equipment to transmit cable programming and relegate over-the-air signals to old, outdated equipment. Serious technical requirements would eliminate this area of potential anticompetitive behavior by cable systems. The FCC should, therefore, impose modern technical standards for all signal transmissions by cable systems.

Finally, the Committee Staff Draft would permit telephone companies to offer video services direct to the home on a common carrier basis without a franchise. NAB supports this change which would help to reduce cable's gateway power if programmers can take advantage of this alternative means of delivery, without creating the problems of telco control over programming.

On behalf of NAB, I appreciate this opportunity to tell you our views on the proposed cable legislation. We believe that the Committee Staff Draft in large measure embodies the steps needed to control the cable monopoly. I urge you to give consideration to the if carry, must pay proposal which you will hear about shortly, and which we believe will complement the provisions you have in front of you in restoring balance to our video marketplace. I will be happy to respond to any questions.

Senator Inouye. Thank you.

Mr. Hedlund.

STATEMENT OF JAMES HEDLUND, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

Mr. Hedlund. Thank you, Mr. Chairman.

I appreciate the opportunity to be here today and testify along with my good friend and colleague Eddie Fritts. As you may know, Mr. Chairman, this is my first appearance at your witness table as the president of INTV. But in advance of me, my predecessor and other representatives of my organization have appeared here on a number of occasions and spelled out the devastating impact that the anti-competitive behavior of the cable industry was having on free local independent broadcasters.

And I do not think it is necessary to repeat that litany of horrors again today, because I think it is evident this subcommittee has decided it is time for action. The central question simply is, is the staff draft amending S. 1880 the proper vehicle.

From INTV's perspective, we think that your staff, the majority and the minority, have done an outstanding job on this bill. And we are enthusiastic about it and strongly support it.

At the outset I would like to make it clear that I did not come here today to engage in some gratuitous cable bashing. I do not think the cable industry is the evil empire. I do not think that it has somehow attracted a disproportionate number of disreputable people. But rather, what has happened is there has been a convergence of some unintentional congressional and FCC actions and inactions combined with, what I think, is some unfortunate court decisions, which have combined and created an environment in which anti-consumer, anti-competitive behavior is virtually guaranteed.

I suspect you put anybody in those set of circumstances, and they would behave in the same way. But nonetheless, from our perspective the only solution is to fundamentally change the structure of the cable industry so that normal, natural human greed and avarice are no longer allowed to run rampant.

Now, I think it no hyperbole to say that one of the foundations of our free information system over-the-air broadcasting is being shaken to its core.

As an industry we cannot and will not abandon our viewers, over 40 percent of whom do not have access to or cannot afford cable television. And in this regard on March 1 INTV filed comments at the FCC urging at a minimum four concrete steps be taken to immediately bring a modicum of balance back to the video marketplace.

First we urge the FCC to adopt non-discriminatory carriage rules. And I intentionally did not say must carry rules, because cable would be given the option of carrying no broadcast signals whatsoever. The option they would not have, however, is to discriminate among local stations by carrying some but not others. The staff draft addresses this concern and meets our approval 100 percent.

Secondly, we call on the commission to adopt rules to govern the cable channel positions assigned to local broadcasters. Again, our objective is certainly not to gain preferential treatment, but to ensure amongst other things that cable does not engage in arbitrary channel shifting simply to favor those program services in which they have a financial interest.

We want to ensure that cable channel positions originally signed to broadcasters by the cable operators themselves for their own specific reasons, cable channel positions that over the years the broadcasters have spent a great deal of time and effort and money promoting, that these channel positions are not in an arbitrary manner taken away from these local stations without their consent.

And thirdly, we believe rules are needed to guarantee that every local broadcaster is carried on a cable channel which is receivable by every consumer on all of the television sets they have hooked up to that cable wire. Once again, the staff draft is on target 100 percent.

Thirdly, we told the commission that in order to address some of the most serious examples of anti-competitive behavior by the cable industry that cable operators should be strictly restricted to the number of channels in which they can have a financial interest. And by financial interest we mean not only equity ownership, but the ability to sell local advertising on those channels.

Now the staff draft does in fact instruct the FCC to adopt rules limiting vertical integration in cable. But we believe a clarification would be desirable that would state and let the commission know that the committee's concern is with all forms of cable financial interest and programming, not just the narrow issue of stock ownership in a program service.

And finally to join my colleague Eddie at the table, INTV also believes that the survival of free broadcast television into the next century demands that cable operators compensate broadcasters in a manner commensurate with the bottom line value our programming provides for cable. You are going to be hearing more about this on a panel later today, so I am not going to dwell on it, other than to say that INTV is pleased to join with Eddie Fritts and the NAB and the other commercial over-the-air broadcasters in supporting this important initiative.

Mr. Chairman, in short, with the few suggestions I have enumerated here and a few others that are in my written testimony, we believe the staff draft is an excellent vehicle. It fairly balances the needs and concerns not only of the public but of the private parties as well.

And as a consequence we look forward to working with you and your staff and the other members of this subcommittee in seeing that it becomes law.

Thank you.

[The statement follows:]

Testimony of

JAMES B. HEDLUND
President
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

I. INTRODUCTION

Thank you Mr. Chairman. My name is James Hedlund and I am President of the Association of Independent Television Stations, Inc., commonly known as INTV. America's 339 Independent television stations constitute the only commercial source of non-network television information and entertainment that is available free of charge to all the American public. We can be found in 137 out of 209 television markets across the United States. Today, Independent television reaches 92.3% of this nations households. It is our hope to continue this service into the next century.

INTV appreciates the opportunity to express its views on the "Staff Draft" amending S.1880 that was released on March 9, 1990. We enthusiastically, support the proposal, with some rather minor revisions. The provisions of S.1880 will help restore balance to the competitive marketplace between cable systems and local broadcasters. I urge the Senate to move swiftly on this proposal. From the standpoint of Independent broadcasters, time is of the essence.

INTV is no stranger to these issues. For the past several years we have submitted testimony to this Subcommittee and its counterpart in the House of Representatives. In this regard, I would like to incorporate our statements from previous hearings and before the FCC, into the record.[1]

The bulk of my testimony will focus on specific language contained in the "Staff Draft". Nevertheless, I believe it is important to state why the Senate should move forward with this legislation.

II. WITHOUT MODEST RE-REGULATION OF THE CABLE INDUSTRY, FREE OFF-AIR TELEVISION WILL BE PLACED AT RISK, JEOPARDIZING THIS NATION'S INFORMATION LIFELINE.

Why should the Congress care about the competitive relationship between cable operators and free off-air television? At stake is our long held national value of promoting a diverse and free information flow to *all* Americans. Studies confirm that local off-air television is the number one source of news and information to the American public.[2] Free off-air television is the information lifeline of our democracy.

---

[1] Comments of the Association of Independent Television Stations, Inc. in MM Docket 89-600 submitted March 1, 1990; *Oversight of Cable TV: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce Science and Transportation*, 101st Cong., 1st Sess. at 380 (November 17,1989) (statement of Preston Padden, President, INTV); *Must Carry: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (October 25, 1989) (statement of Preston Padden, President INTV); *Cable TV: Hearings before the Subcomm. on Communications before the Senate Comm. on Commerce, Science and Transportation*, 101st Cong., 1st Sess. (June 21, 1989) (statement of Preston Padden, President INTV); *Cable TV: Hearings before the Subcomm. on Antitrust Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (April 12, 1989)(statement of Preston R. Padden, INTV); *Cable TV: Hearings before the Senate Subcomm. on Antitrust, Monopolies, and Business Rights of the Comm. on the Judiciary*, 100th Cong., 2d Sess. (March 17, 1988) (statement of Milton Maltz, Chairman & CEO, Malrite Communications Group): Association of Independent Television Stations Inc., "*Free Television Under Siege: Typical and Illustrative Case Histories of Anti-Competitive Conduct by Cable Television Systems*", May 1988.

We may lose this lifeline in the next decade unless the unbridled power of cable is restrained today.[3] What about the countless millions of Americans who cannot be connected to the wire or are unable to afford the subscriber fee?[4] Where will they access information about their local communities? These people will be disenfranchised from the information flow. They will become "information have nots" in a society that is rushing head long into the 21st century with its promise of advanced telecommunications.

---

[2] By a better than six to one margin, Americans say broadcast television has better local news (probably because few cable channels carry local news programs). And by a 12 point margin, the public says that regular television provides better national news coverage. See 1989 TIO/ROPER REPORT, at 5.

[3] A recent study concluded:

> As the decade draws to an end, broadcast television has seen its competitive universe turned upside down. Once apparently invulnerable, with steadily growing advertising revenue and growing audiences, broadcast television now sees simultaneously its advertising revenues and its audiences shrinking. Broadcast television faces a competitive force - cable television - that is enjoying steadily rising revenues, is spending more for programming and is attracting away broadcast viewers. The current calculus is at its historically most precarious for broadcasting. As broadcasting's revenue growth has slowed, so has its spending for programming. Hence, broadcasting's rivals for programming - basic cable and pay cable programming - both flush with rising advertising revenues and higher user fees, are bidding programming and thereby audiences away from broadcasting. Any further negative shocks to the broadcast advertising revenue stream would accelerate this process.

Lilley, William III and Rudolph Penner, Impact of Advertising on the Competitive Structure of the Media: With a Special Analysis of Advertising of Automobiles, Beer, Wine Tobacco and Liquor, (Leadership Council on Advertising Issues, 1990) at 14. (hereinafter "Lilley & Penner")

The Office of Technology Assessment concluded recently:

> ...[C]hanges in the U.S. communications infrastructure are likely to broaden the gap between those who can access communications services and use information strategically and those who cannot. Moreover, the people most likely to be adversely affected will be those for whom the new communication technologies are held out as a means to improve their circumstances -- the poor, the educationally disadvantaged, the geographically and technically isolated, and the struggling small business.[5]

Absent free off-air television, government policy makers will be confronted with the costs of providing some form of lifeline service for those not connected to the wire, a cost which must be borne by the taxpayer or subscribers. Free off-air broadcasting provides this lifeline service without the need for government subsidies. On the contrary, the advertising on free television helps drive the economy.[6]

---

[4] The cable audience is relatively wealthier than the broadcast audience. Of course the broadcast audience pays nothing for its programming. The income disparity between cable and cable households appears to be widening. In 1984, the disparity was 12.5%. In 1988, the disparity increased to 14.3%. Id. at 27.

[5] U.S. Congress, Office of Technology Assessment, Critical Connections: Communications for the Future, OTA-CIT-407 (Washington, DC: U.S. Government Printing Office, January 1990) at 11.

For those fortunate enough to subscribe to cable, control over information will be in the hands of one entity - the cable operator. The problem is exacerbated by the tremendous horizontal concentration that exists in today's cable industry. A half century of effort to promote diverse local ownership of the mass media will be in vain. Unless rules are established today, the political destiny of local communities across America will be placed in the hands of one monopoly gatekeeper.[7]

I am not here to denigrate cable. Cable has provided the American public with new viewing options. Nevertheless, we cannot ignore the centralization of power that now defines the cable industry. Government policy should be directed towards rectifying the competitive imbalance in today's marketplace. The American public cannot wait for the promised development of new technologies such as MMDS, DBS or broadband fiber optics.[8] America's only viewing alternative to cable is off-air broadcasting. This free viewing option is in danger because the lack of regulatory oversight has led to excessive concentration in the cable industry. If action is not taken, we may lose the only alternative to cable before the arrival of competitive alternatives.

---

[6] See e.g., Steiner, Robert. " Judging the Welfare Performance of Manufacturers' Advertising", Jour. of Advertising, Vol. 10 (1981) at 3-13.; Farris, Paul & Mark Albion, "The Impact of Advertising on the Price of Consumer Products," Jour. of Marketing, Vol. 44 (1980) at 17-35.

[7] The inter-relationship between must-carry, channel position and the political broadcasting requirements of Sec. 315 and 312 A(7) should not be overlooked. Without must-carry or channel positioning regulations there is no guarantee that political messages on broadcasting will ever be seen by half the television audience. The efficacy of both these statutory requirements can be undermined in the present unregulated environment. Moreover, there is a fundamental difference between having the option to acquire political time from several broadcast channels in a local market as opposed to a single monopoly video provider. Finally, imposition of political broadcast rules on cable are more difficult from a constitutional standpoint than imposing similar restrictions on broadcasting. See Cable Television: Hearings before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 2nd Session (May 11, 1988) at 297 (Statement of Commissioner James H. Quello). Attached as Appendix A.

III. THE CABLE INDUSTRY HAS BECOME HIGHLY CONCENTRATED, CREATING ANTI-COMPETITIVE INCENTIVES

A. Horizontal Concentration

The trend towards increasing concentration in the cable industry is unparalleled in American industry. The top two MSO's serve 34% of all basic cable subscribers.[9] Moreover, TCI, the largest MSO has interests in cable systems that reach 11.9

---

[8] While we applaud efforts to increase competition, such a policy is no substitute for carefully crafted re-regulation at this time. Today, MMDS reaches only 0.4% of cable subscribers. Notice of Proposed Rulemaking & Notice of Inquiry in Gen Docket No. 80-113, 90-54, FCC 90-60, (released February 22, 1990) at 1 n.9. While there has been renewed interest in DBS, we may not see an operational system until 1995. Cableworld, January 20, 1990, at 4. Finally, the most optimistic estimate for the installation of broadband fiber by telephone companies places fiber in only 18% of U.S. households by the year 2000. Pepper, Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change, November 1988, at 101.

[9] Wall Street Journal, March 19, 1990 at B1.

million subscribers, amounting to 22% of all cable subscribers.[10]

Should this development concern the Congress? Yes! Its traditional concerns with media concentration -- promoting diversity of voices and economic competition -- are dramatically present in the cable industry.

Separate and antagonistic ownership of the mass media has long been a goal of federal policy makers. The policy has its foundation the First Amendment goal of promoting a diversity of ideas and speech throughout the country.[11] Federal policy has always been vigilent to restrain concentration when it threatened a diversity of voices even though it did not rise to the level of an anti-trust violation.[12]

The Congress should be more concerned with horizontal concentration in the cable industry. Each cable operator is a local monopoly gatekeeper. As a gatekeeper, the local cable operator has ultimate control over what information goes through the gate and down the pipeline.[13]

---

[10] Id.

[11] See Associated Press v. United States, 326 U.S. 1, 20 (1945)

[12] See FCC v. National Citizens Committee for Broadcasting, 426 U.S. 775 (1948); United States v. Storer Broadcasting Co., 351 U.S. 192, 193 (1956).

[13] Broadcasters have no such control. Regardless of their size, they are only one voice in a local market. They have no control over other channels of information. Unlike the cable operator, broadcasters cannot turn off the information spigot.

Excessive horizontal integration has its economic consequences as well. By controlling an ever increasing subscriber base, large MSO's are able to multiply the monopoly power of each local system and exert leverage over the program industry. Manifestations of this power can be seen in the ability of large MSOs to extract monopoly rents from the program community. Large MSO's are able to secure large bulk discounts from cable programmers. Yet surprisingly, the prices charged to subscribers are generally the same for both large and small cable operators. In other words, the savings from these large bulk discounts are not passed on to consumers. They are retained as monopoly rents by the cable operator.[14]

The most extreme example of this raw power is the ability of large multiple system operators to extract ownership interests from cable programmers. A situation that has led to rapid and excessive vertical integration in the industry.

---

[14] See Shooshan & Jackson, Economic Analysis of Concentrated ownership of cable Systems., July 18, 1986, at 1.

B. Vertical Integration

Vertical integration has become the cable industry's hallmark. Our complaint is not against vertical integration *per se*, but, with the fact that there is a monopoly gatekeeper at the end of cable's vertical chain.[15]

Controlling essential facilities in local markets has given large MSO's the ability to extract equity interests from the programming services carried on each system. A brief review of the relationship between largest MSO's and the most popular cable networks proves the point.[16]

---

[15] Cable can be distinguished from broadcasting in this regard. Cable's local monopoly pipeline multiplies the power of vertical integration. Cable can make channel position and carriage decisions without regard to subscriber preference. Cable subscribers have no alternative. Moreover, cable can pass all of its programming costs on to its subscribers with little fear of customer loss. The GAO's analysis that basic cable rates increased 29% with no subscriber loss attests to the relatively inelastic demand enjoyed by the cable industry.

Of course there is vertical integration in broadcasting. However, vertical integration in broadcasting does not end in a local monopoly franchise. Vertically integrated broadcasters must compete with each other in local markets throughout the country. Even in this situation, however, the government has established rules governing vertical integration. *See* Financial Interest and Syndication Rules, 47 C.F.R. Sec. 73.658(j) (1988). Because of its local monopoly, the cable industry presents a far more compelling case for rules governing vertical integration than broadcasting.

TCI	TIME/WARNER	VIACOM	CABLEVISION
BET(50%)	BET	MTV/VH1	Bravo
AMC(43%)	HBO/Cinemax	Nickelodeon	AMC(50%)
Discovery Channel (14%)	Comedy Channel	The Movie Channel	CNBC(50%)
Home Sports Network(60%)	TBS (CNN, TNT Headline News) WTBS	Lifetime (33%)	Sports Ch. (50%)
QVC Network (36%)		Pacific Sports Network (50%)	Sports Ch. Amer.(50%)
Showtime Ntwks.(50%)		Prime Northwest Sports Net. (50%)	
TBS (CNN, TNT Headline News) WTBS		Showtime	

The level of vertical integration is evidence of the leverage that large MSO's can exert over their program suppliers.[17]

Apart from creating distortions in the program market, vertical integration when combined with a local monopoly bottleneck creates dangerous anti-competitive incentives.[18] First, there is a strong incentive for cable operators to favor their own programming services over what is perceived to be competitive independent services. NBC's experience with TCI and its failed attempt to launch a competitive news service to CNN illustrates the point. In addition, Viacom was forced to litigate against Time Inc, in order to gain access for Showtime in New York.

---

[16] Channels: 1990 Field Guide, January 1990 at 67-68.

[17] Recently, TCI has proposed to "spin off" its programming services from its cable systems. This so called "spin-off" should be renamed "All in the Family". The owners, boards of directors and corporate offices will be the same. Moreover, there is no guarantee that TCI will not simply merge the companies at a future date. Compare this so-called "spin-off" with CBS when it was required to divest itself of Viacom. In that case the Commission prohibited common ownership of stock and prohibited CBS employees from sitting on Viacom's board of directors. See Columbia Pictures Industries Inc., 21 RR 2n 1313 (1971). TCI's actions were designed to help its position on Wall Street. The so called "spin-off" should be given no weight as a regulatory matter.

Broadcasters are in a more precarious position because they compete directly with local cable operators for advertising revenue. This provides an added incentive to deny carriage or reposition a broadcast signal.[19] If a broadcaster loses some of its audience then it enhances the value of the cable system's program service. The loss of viewership also benefits the cable operator who is competing with the broadcaster for local advertising revenue. Thus, there is a double incentive for cable operators to take anticompetitive steps against broadcasters.[20]

---

[18] There may be a disincentive to engage in new program production, if large MSO's can extract equity thereby reducing future profits. See Shooshan & Jackson, Economic Analysis of Concentrated Ownership of Cable Systems, July 18, 1986.

Moreover, as will be discussed infra, placing broadcasters at a competitive disadvantage will ultimately damage the program market. The competition resulting from broadcast participation keeps the programming market healthy. However, the trend is for broadcasting to account for less of Hollywood's entertainment budget (from 18.5% in 1988 to 17.5% in 1993) while cable's expenditures continue to grow (from 27.9% in 1988 to 29% in 1993). See Veronis, Suhler & Associates; Communication Industry Forecasts, 1989-1993 at pg 83. Cable's increasing strength will eventually allow it to dominate the programming market.

[19] Ownership of programming and advertising also provides a disincentive for cable operators to develop extensive channel capacity. At some point the cable operator must balance the revenue earned from the additional narrow interest channel against the advertising loss due to increased fragmentation of the audience. Many cable operators have found that 36 channels provide the optimum capacity. See Paul Kagan Associates Inc., Marketing New Media. January 18, 1990.

In sum, cable has become a vertically and horizontally integrated monopolist. No less an authority than R. E. (Ted) Turner has averred in a federal court complaint that cable operators exercise monopoly power over essential facilities.[21] Wall Street analysts said it best when it described why TCI was an attractive stock because it "dominates a monopoly business and is still growing".[22]

---

[20] It is in this context that INTV opposes the creation of local cable channels such as WGRC in Rochester NY. These local "channels" enjoy the advantage of large vertically integrated parent company, in this instance Time/Warner, as well as the benefit of a local monopoly. Unlike other competitors Time/Warner can cross promote WGRC on multiple channels; draw revenues from subscribers to purchase programming; sell advertising in combination with other channels; control the channel position or carriage of competitors and utilize the vast resources of Time/Warner for acquiring program product. The pattern of abuse has already begun. For example; WGRC has already presented preview weekends of HBO and Cinemax, complete with spot adjacencies. WGRC has already "cherry picked" programming from traditional pay services. For example Buffalo Sabres hockey games, normally found on regional pay sports channels, have been carried on WGRC. The ability to "cherry pick" programming from traditional pay service, gives WGRC -- a basic cable service -- a jump in the normal film distribution pattern. The strategy most certainly will increase viewership on the channel thereby attracting more advertising. No other competitor has the ability to engage in such activity or draw upon the programming strength of a corporate giant.

[21] Cable News Network, Inc. v. Satellite News Channels, Civil Action File No. C83-430 A, U.S. District Court N.D. GA, (Complaint filed March 3, 1983).

[22] County NAT WEST USA, November 8, 1989, at 1.

IV. CABLE HAS AND WILL CONTINUE TO EMPLOY ANTI-COMPETITIVE PRACTICES AGAINST LOCAL BROADCASTERS

The cable industry will act on its anti-competitive incentives. Even during a period of heightened scrutiny by Washington, the cable industry has shown a propensity to flex its anti-competitive muscle. A study of the cable industry's behavior was performed by the FCC in 1988. This study was commenced at the behest of Chairmen Hollings, Inouye, Dingell and Markey. To date, this study remains the only true independent analysis of carriage and positioning problems. Its results are most revealing.[23]

Generally, the study underestimates the problem. The carriage data submitted by cable systems was on a purely "voluntary" basis. Only 50.6% of the cable systems surveyed returned their questionnaires at all. The over 4,000 cable systems that refused to respond are more likely to be the systems that had more to hide than those that voluntarily disclosed local signal carriage information.[24]

---

[23] A copy of the Commission's Report is attached as Appendix B.

[24] It is also significant that the Commission "had to rely on the [cable operator] survey participants for the accuracy for the data provided." FCC Report at Paragraph 3. This means that every mis-statement or under-statement of the number of local stations denied carriage by a cable system went completely undetected by the Commission.

A. There Is Substantial Objective Evidence That Vertically Integrated Monopoly Cable Operators Have Denied Carriage To Local Broadcast Stations.

However, even the incomplete and probably skewed data submitted by cable systems to the Commission demonstrates graphically that denial of carriage of local television stations by cable systems is extremely widespread. The Report reveals, among other things, that:

1. Of the 4,303 cable systems that voluntarily disclosed data to the FCC, 869 systems admitted denying carriage to 704 television stations in 1,820 instances.[25] Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise" post-*Quincy* must-carry rules agreed upon by both the cable and broadcast industries.[26]
2. 241 of the reporting cable systems have denied carriage to three or more local stations, and 113 systems have denied carriage to four or more stations.[27]
3. The vast majority of local Independent stations dropped by responding cable systems -- at least 378 of 485 (78%) -- were located within 50 miles of the cable headend.[28]
4. By far the most frequent replacement for a dropped local television station is a basic cable network -- the program services in which cable operators often own equity interests and/or profit from local advertising sales.[29]

---

[25] *FCC Report*, Table 2.

[26] *Id.*, Table 2A. These figures are extrapolated and therefore approximate.

[27] *Id.*, Table 4.

[28] *Id.*, Table 7.

[29] *Id.*, Table 8.

5. In 236 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these payments exceeded $45,000 per year.[30]

It bears repeating that these are numbers supplied voluntarily by the one-half of the cable systems surveyed by the Commission that returned their questionnaires. Even among these systems that came forward, more than 20 percent (869 of 4,303 systems) have dropped one or more local stations from their channel lineups in 1,820 instances.

If one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did _not_ disclose information to the FCC is roughly the same (_and_ that none of the reporting cable systems understated their non-carriage of local stations), it would mean that approximately _1,700_ cable systems have denied carriage of local free television stations in approximately _3,600_ instances. Thus, _any_ way that one looks at these numbers, the FCC Report reveals clearly that non-carriage of local stations by cable systems is a serious problem numbering in the thousands in terms of both cable systems and incidences of non-carriage.[31]

---

[30] _Id_., Table 14. 120 instances of cash payments and an additional 30 instances of a "combination" of considerations were reported. _Id_.

[31] The National Cable Television Association also conducted its own study of cable broadcast signal carriage practices. NCTA's report is too self-serving and biased to be accorded any significant evidentiary weight. However, even the NCTA report revealed that 205 cable systems that chose to respond were not carrying, and 2.5 million cable subscribers were not seeing, all the local stations "qualified" for carriage under the watered

To supplement the aggregate numbers in the FCC and NCTA surveys, INTV in 1988 prepared a compendium entitled "Free Television Under Siege".[32] The report contained a synopsis of cable mis-deeds in local markets all across the country. Letters from local broadcast stations describing their difficulties in greater detail were also included. Finally the report included an appendix which contained various evidentiary materials (including letters from viewers and cable operators) relating to these case histories.

The pattern of anti-competitive abuse continues to this day. In its most recent filing with the Federal Communications Commission, INTV submitted additional examples of cable's miscreant behavior. We found an additional four new stations that were on the air but never given carriage.[33] We also uncovered 17 stations that were dropped from cable systems.[34] In

---

down "post-Quincy" compromise must-carry rules. NCTA Report at 7, Table 1. In short, even the cable industry's own self-serving data demonstrates the existence of a problem.

[32] A copy of this report was submitted to this Subcommittee on a pervious occasion. A summary of the results is included and attached as Appendix E.

[33] KTVD-TV Ch. 20 Denver, CO; WAKY-TV Ch. 56 Melbourne, FL; WGOT-TV Ch. 60 Merrimack, NH; WYHS-TV Ch. 69 Hollywood, FL. Some stations were never carried by several cable operators. See Appendix C.

[34] KDVR-TV Ch. 31 Denver, CO; KLJB-TV Ch. 18 Davenport, IA; KSCI-TV Ch. 18 San Bernardino, CA; WACX-TV Ch. 55 Leesberg, FL; WCAJ-TV Ch. 68 Birmingham, AL; WHMB-TV Ch. 40 Indianapolis, IN; WNEG-TV Ch. 32 Toccoa, GA; WOAC-TV Ch. 67 Canton, OH; WTGI-TV Ch. 61 Philadelphia, PA; WCOR-TV Ch. 20 Montgomery, AL; KLJB-TV Ch. 18 Davenport, IA; KTXL-TV Ch. 40 Sacramento, CA; WFHL-TV Ch. 23 Decatur, IL; WFXT-TV Ch. 25 Boston, MA; WAMI-TV Ch. 15 Mobile AL; WWAT-TV Ch. 53 Chillicothe, OH; WYED-TV Ch.

some cases, a station was dropped or denied carriage on several cable systems.

Denials of cable carriage have had a tremendous negative impact on local broadcast stations. Last year twenty-three commercial Independents were in various stages of bankruptcy proceedings. A recent survey conducted by the INTV Journal found that 12 Independent stations went off the air in 1989. While cable carriage practices were not the sole cause of these bankruptcies, they certainly were a major factor.

B. Cable Operators Have Engaged In Anti-Competitive Repositioning Of The Channels Of Local Stations.

System operators have not been reluctant to employ an anti-competitive tactic almost as damaging as non-carriage -- channel shifting. Channel shifting creates two problems for broadcasters. First, audience confusion reduces viewership. After building an audience on a particular cable channel, broadcasters are shifted and audiences can't find them.

Second, cable operators have built distribution plants in which all of the channels are not equal. The first twelve channels (2-13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not

---

17, Goldsboro, NC. All of the above stations were dropped from cable systems located within a television stations grade B contour. Nine stations were dropped by cable systems within 35 miles of the station. See Appendix D.

viewable on many cable-connected sets. Local stations shifted to a channel position higher than 13 cannot be received at all on many television receivers. Non-"cable ready" sets that are connected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13.[35] Being shifted "up" is the equivalent of being removed from the system with respect to these television sets. The signal goes down the wire but does not exit. Thus, cable system operators are able to inflict competitive injury on local Independent stations by moving them from desirable low number channel positions to "cable Siberia".

In the FCC's survey, 974 of the cable systems responding admitted that they had channel shifted one or more local stations in almost 3,000 instances.[36] Only 15% of these shifting instances were attributable to "technical" reasons.[37] In almost every instance, the stations shifted have been replaced by cable program services in which the system operator is selling advertising and/or in which the operator has an equity interest.

INTV conducted its own unscientific study of 70 instances of channel shifting on TCI cable systems as reported to our Association. In 65 of those 70 instances, the original channel position of the local station was subsequently filled with a program service in which TCI had an equity interest.

---

[35] Estimates of the universe of non-"cable ready" sets are difficult to calculate. Nevertheless, based on data from the 1989 Television Fact Book, approximately 42% of existing television sets in homes today are not "cable ready".

[36] FCC Report at Table 10.

[37] Id., at Table 13.

INTV's report "Free Television Under Siege" is replete with examples of anti-competitive channel shifting by cable operators. Moreover, these channel shifting problems continue to occur on an almost daily basis. On January 1, 1989, the leading Independent station in West Palm Beach FL was shifted, without any warning, from channel 9 to channel 29 on a major local cable system. Repeated efforts to resolve the issue with the local cable manager, and with senior corporate officials, have proven fruitless. In December, 1988 KICU-TV in San Francisco, was shifted off of channel 6 to make room for a cable barker channel promoting the system operator's proprietary pay-per-view service. In January 1989, the TCI system in Millbrae, California, moved three local Independent stations out of the VHF band and replaced them with three cable program services (CNN, American Movie Classics and The Discovery Channel) in which TCI holds substantial equity interest and in which TCI sells advertising availabilities. The stations received no notice of the shifts, which occurred just three days prior to the start of the critical February Nielsen and Arbitron rating period. One of the stations commissioned an independent, professional survey that showed that 20% of Millbrea cable households with "second" TV sets, who could formerly receive the station on those second sets, are no longer able to do so because of the channel shifts.

Another example involves the Kansas City market. ATC is the biggest and most important cable system in Kansas City, Missouri. In October of 1988, it embarked on a policy of channel shifting that confused the public and prevented signals from reaching many viewers. For whatever reasons, ATC repositioned all local broadcast stations in Kansas City. The three VHF network affiliates were all moved off-channel after years of being carried on-channel. KSHB-TV, Ch. 41, which for years had been carried on channel 3, was moved to channel 33. The local Kansas City stations were moved around to make room for cable program services on which ATC sold advertising and had an ownership interest.

The systematic repositioning of local broadcast stations continues. INTV recently submitted additional evidence of this problem to the FCC. We found that an additional 26 stations that had been repositioned.[38]

In several communities across the country, following system "upgrades", local stations have been shifted to high UHF channels that most consumers cannot receive even on their primary sets. Typically, these systems expand from 36 to 54 channel capacity, but require consumers to disconnect their old 36 channel converter boxes and drive to the cable office to trade for new 54 channel boxes. In the meantime, local stations shifted to channel positions between 36 and 54 cannot be viewed via cable.

---

[38] KAME-TV Ch. 20 Reno, NV; KBHK-TV Ch. 44 San Francisco, CA; KCWT-TV Ch. 27 Wenatchee, WA; KDVR-TV Ch 31 Denver, CO; KTTY-TV Ch. 69 San Diego, CA; WACX-TV Ch. 55 Leesburg, FL; WDZL-TV Ch. 39 Miami, FL; WGNT-TV Ch. 27 Portsmouth, VA; WGSE-TV Ch. 43 Myrtle Beach, SC; WHNS-TV Ashville, NC; WOAC-TV Ch. 67 Canton, OH; WPGH-TV Ch. 53 Pittsburgh, PA; WPMT-TV Ch. 43 York, PA; WPTY-TV Ch. 24 Memphis, TN; WYST-TV Ch. 68 Syracuse, NY; WTPG-TV Ch. 44 St. Petersburg, FL; WTTE-TV Ch. 28 Columbus, OH; WTTO-TV Ch. 21 Birmingham, AL; WTVZ-TV Ch. 33 Norfolk, VA; WTXX-TV Ch. 20 Waterbury, CT; WUTV-TV Ch. 29 Buffalo, NY; WXMI-TV Ch. 17 Grand Rapids, MI; WDSI-TV Ch. 13 Chattanooga, TN; WOIO-TV Ch. 19 Shaker Heights, OH; WZDX-TV Ch. 54 Huntsville, AL; WFFT-TV Ch. 55 Fort Wayne, IN. See Appendix E.

Channel shifts are not a product of consumer demand. In virtually every instance, the local stations shifted are more popular (higher ratings), than the cable program services that replace them. Shifts are made solely to enhance the competitive position of the cable operator's programming and his advertising availabilities. Any doubt regarding the motivation for the cable channel shifts can be resolved by the candid explanation of one major MSO -- Jones Intercable. In a May 27, 1987 letter to advertisers, Jones described its motivation for a recent channel shift as follows:

> "On March 1, 1987, Jones Intercable made changes that greatly enhanced the value of advertising placed with us. On that date, we realigned our channels bringing four of the five channels (The Nashville Network-4, Cable News Network-6, ESPN-12, and USA-8) on which we insert advertising to channel positions between 2 and 13.
>
> "Studies performed on viewership patterns on channels 2 through 13 show that they are viewed 30% more often than higher channel positions. This means that the advertiser's exposure to area consumers increased greatly without additional cost."

In sum, there is ample objective evidence that cable operators have engaged in anti-competitive channel shifts.

The devastation of channel shifting as an anti-competitive strategy can be seen in the audience loss that accompanies the repositioning. The following examples demonstrate the point. In each case, audiences in cable households declined after the station was repositioned. The decline cannot be attributed to programming because in each instance the audience share in non-cabled households increased.

> WGNT, Portsmouth, VA; The station was shifted from channel 7 to channel 27. Its off-air audience increased by 4% while its cable audience declined 18%.
>
> WPGH, Pittsburgh, PA; The station was shifted from a VHF to UHF position. Its off-air audience increased 7% while its cable audience declined 8%.
>
> WPTY, Memphis, TN; The Station was shifted from channel 12 to channel 24. Its off-air audience increased 29% while its cable audience declined 17% after the channel shift.
>
> WTTE, Columbus, OH; The station was repositioned from channel 9 to channel 22. Its off-air audience increased 20% while its cable audience declined 6% after the shift.
>
> KDVR, Denver, CO; The Station was shifted from channel 10 to channel 31. Its off-air audience increased 27%, but its cable audience did not increase after the shift.

The audience loss in these examples is more than enough to justify government action. For example, the FCC found a loss of 1-2 percent in audience to be a sufficient dislocation to warrant re-imposition of the Syndicated Exclusivity Rules.[39]

---

[39] See Report and Order in Gen. Docket No.87-24, 3 FCC Rcd. 5299 (1988) at para. 41. A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters.

V. EXISTING REGULATORY STRUCTURE DISTORTS THE MARKETPLACE BY GRANTING CABLE COMPETITIVE ADVANTAGES

A. Broadcasting provides cable with a massive subsidy via the compulsory copyright.

1. The subsidy is significant.

The existing compulsory copyright system gives local cable operators an incredible subsidy. Pursuant to federal law, broadcasters cannot receive any payment for the retransmissions of their signals by cable operators.[40] The subsidy has existed for years. It was designed originally to insure that an infant cable industry had access to programming. The inequity of this privilege can no longer be tolerated.

In 1989, local broadcasters spent 1.8 billion dollars acquiring programming from Hollywood.[41] Cable operators paid nothing to acquire this programming. However, they retransmitted the programming to their subscribers and charged for it.

The most ironic aspect of this scenario is that free off-air broadcasting accounts for 74% of the audience share points in cable households. Moreover, Independent television alone receives a 21% prime time audience share in cable households.[42]

---

[40]. Under the royalty fee provisions of the Copyright Act, cable systems pay nothing for the right to retransmit programming from local broadcast stations. See 17 U.S.C. Section 111 (c)(d)

[41] Veronis, Suhler & Associates Inc., *supra*, n. 18 at 83.

[42] *Advertising Age*, January 8, 1990, Supplement at 11.

In the last quarter of 1989 viewing on Independent television alone accounted for 15% of the viewing in cable households, exceeding the audience share of all basic cable channels.

The absurdity of the present situation can be seen in the following example. A cable network, such as TNT, receives an average 24 hour rating of .75 which translates into a viewing share of 2 %.[43] Even though the cable network receives a de-minimus audience share, cable operators are willing to pay $.20 per subscriber for the programming. At the same time, the third Independent broadcast station in the market attracts a larger audience than the cable network, with a 24 hour rating of 1.20 translating to an audience share of 3.2%.[44] However, the cable operator does not have to pay the broadcaster. Indeed, despite the obvious consumer preference cable operators will seek to reposition the broadcast station in order to increase viewership on the poorly viewed cable channel. Simply stated, cable operators pay fees to carry programming that draws less of an audience, but do not pay a dime to retransmit the more popular programming of a local broadcaster.[45]

---

[43] Paul Kagan Associates, Inc. Marketing New Media, No. 8, January 1990, at 2.

[44] Id.

[45] Indeed, according to James Mooney, President, NCTA, the audience share of cable networks is such that it is not economically feasible to sell these program channels on an a la carte basis. They are economically viable only if they are sold as a package. Must Carry: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation United States Senate, 101st Cong., 1st Sess., October 25, 1989 at 118.

Quantification of this subsidy can be seen in a recent study by Paul Kagan.[46] Based on audience viewing shares, Kagan found that off-air broadcasting contributed $9.45 of value to the average cable bill of $16.93. According to these statistics, off air broadcasting accounted for 55% of a cable operator's net revenue. Independent television alone contributed $2.32, thereby accounting for 13.7% of cable's net revenue.

2. Broadcaster's subsidy to cable outweighs the value of cable's antenna service.

Many in the cable industry argue that cable subsidizes broadcasting by providing a valuable antenna service that extends a broadcaster's coverage. The argument is unpersuasive for several reasons. First, cable's value as an antenna service is due in large measure to an industrial policy that systematically told subscribers that they would not longer need to retain off-air access.[47] Cable made itself indispensable. Second, cable has systematically denied other antenna services access to programming, thereby stifling any other competitive off-air antenna service such as SMATV or MMDS. Third, the value of the antenna, in terms of advertising reach, can be questioned. With the exception of areas with significant terrain problems, off-air broadcast signals provide superior signal quality to the most populated portions of their market, (i.e., the television metro area). Cable may serve to extend the reach of broadcast signals out beyond the grade B, but if these areas are less populated, they may not increase appreciably a television station's overall audience. Of course this analysis will vary from market to market.

---

[46] Paul Kagan Associates, Inc., Marketing New Media, No. 8, January 15, 1990, at 2..

[47] Report and Order 1 FCC Rcd. 864 (1986), vacated, Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir 1987), cert. denied, 108 S. Ct. 2014 (1988). The Commission found that cable systems systematically took down subscriber's antennas, thereby preventing off-air access.

Finally, and perhaps most importantly, cable systems do not always provide good quality signals. For example, a recent survey of cable subscribers in New York found that 56.1 percent of Paragon's subscribers and 60.6 percent of Manhattan Cable's subscribers experienced repeated or prolonged reception problems. Moreover, 35% of Paragon's subscribers and 40% of the Manhattan Cable's subscribers rated signal quality as poor.[48] Thus, rather than enhancing signal access, cable may actually reduce access to signals in the most populated areas.

In sum, the purported value of the antenna service does not outweigh the massive subsidy given cable operators by the compulsory copyright. Of course, the value of the antenna service is further reduced given the repositioning of signals by cable operators.

---

[48] New York Times, March 21, 1990 at B1.

B. Cable Enjoys the Luxury of Two Protected Income Streams: Subscriber Fees and Advertising.

In its recent Notice of Inquiry regarding cable television, the FCC recognized that the existing franchise process has insulated cable from competition by multi-channel service providers.[49] The impact of the exclusive franchise process can be seen in the number of competitive overbuilds across America.

Creating a local multichannel monopoly has enshrined cable's monopoly franchise, insulating it from the pressures of price competition. Its subscribers are held captive with no other alternatives. In this environment, cable has the ability to simply pass on costs of programming to subscribers. The GAO found that rates for the lowest priced basic service increased 29% and the monthly rates for the most popular basic cable services increased by 26%.[50]

Nevertheless, despite rate increases that were three times the consumer price index, cable subscribership continued to increase. Indeed, total spending on subscriptions will continue to grow at a compound annual rate of 6.6%. In 1988 revenue from subscriptions amounted to $10.3 billion dollars. This will increase to $14.2 billion by 1993.[51]

---

[49] Notice of Inquiry in MM Docket No. 89-600, FCC 89-345 (released December 29, 1990).

[50] GAO: National Survey of Cable Television Rates and Services, August 1989.

[51] Veronis, Suhler & Associates, supra, n. 18 at 67.

The most logical explanation for this fact is that the demand for cable service is relatively inelastic, and not sensitive to price. In other words an increase in price will not result in a significant loss of subscribership.

Cable is also given the advantage because it is the sole provider of multichannel advertising. It has the unique ability to sell advertising packages on multiple channels. In contrast, a broadcaster is limited to one video advertising channel per market.[52] While broadcasters may, in certain circumstances own a radio and a television facility, engaging in joint advertising arrangements may create antitrust problems.[53]

Cable can also manipulate the channel lineups to increase audience exposure to specific channels thereby maximizing exposure to advertisers. It is no wonder that cable is looking to advertising as a significant source of revenue in the future. In 1993, advertising will account for 14.7% of the industry's revenues, compared to 5% of the industry's revenues ten years earlier.[54]

Between 1988 and 1993 total cable advertising will grow at a compound annual rate of 16.1%. Local advertising will grow at a compound annual rate of 17.1% from $250 million in 1988 to $550 million in 1993. National advertising will grow from $910 million in 1988 to $1.9 billion by 1993.[55]

---

[52] See 47 C.F.R. 73.3555 (a)(b)(1988).

[53] While the Commission has eliminated its regulations regarding combination and joint advertising practices, engaging in such activity may give rise to antitrust violations, which if adjudicated, could threaten a broadcast license. See Elimination of Unnecessary Broadcast Regulation, Second Report & Order in MM Docket No. 83-842, FCC 86-111 (released March 31, 1986) at para. 56

[54] Veronis, Suhler & Associates, supra, n. 18 at 67.

VI. COMPETING AGAINST AN UNREGULATED MONOPOLY WITH A DUAL REVENUE STREAM WILL LEAD TO THE DEMISE OF OFF-AIR BROADCASTING.

Concerns over the demise of off air broadcasting are not simply empty rhetoric from Washington lobbyists. The scenario has already been described by economic experts.

> Expansion in the number of cable households will boost cable audiences and advertiser use of cable as a medium. As the basic cable networks realize rising advertising revenues, along with rising fees from cable systems, they will have greater economic resources to purchase higher priced programs. Higher quality programs should generate larger viewing audiences.[56]

Broadcasters are now in a cycle in which they will be continually outbid for programming. This in turn will lead to a decline in audience and subsequent loss of revenue.

> The emerging competitive calculus -- one increasingly favorable to cable -- has clear social implications. Put simply, as the cable audience grows and the broadcasting audience shrinks, the cable audience in relative terms becomes wealthier and the broadcasting audience poorer. This disparity is broadening as cable raises its user fees in order to cover its increased programming costs, resulting from bidding higher priced programming away from broadcasting.[57]

---

[55] _Id_. at 67.

[56] _Id_. at 65

[57] Lilley & Penner, _supra_, n.3 at 14.

The downward spiral has already begun, as top quality programming is being siphoned off free off-air broadcasting.

A. Sports Siphoning

Sports siphoning has become commonplace.[58] For example, in New York after 1991 you will not be able to see local Yankee games on free off-air television. The 75 games formerly seen on WPIX will evaporate. This summer, you will be unable to see any Major League Baseball games on Wednesday nights due to a contract between Major League Baseball and ESPN.[59] In fact for the first time the number of Major League Baseball games on free television will decrease in 1990.[60]

---

[58] None other than TCI has decided to take regional sports channels off its basic tier in a move which is "designed to curb the prospects of so called siphoning of sports programming from broadcast to cable and to control escalating cable rates". Multichannel News, March 12, 1990 p.1

Of course TCI's new policy will not apply to two major cable sports programmers, ESPN and WTBS. Moreover, while admitting the problem of sports siphoning, TCI's decision was made in contemplation of the return of rate regulation of the basic tier. With rate regulation in place, cable operators would no longer be able to pass on the increased costs of sports programming. Removing regional sports programming from the basic tier allows TCI to create an unregulated service tier. Depending on how the system is ultimately packaged, liberating sports channels from potential rate regulation may actually exacerbate sports siphoning.

[59] In 1989, ESPN signed what was at the time the largest program acquisition in cable history by winning exclusive rights to 175 MLB games each year from 1990-1993. While ESPN has the greatest penetration of any cable network - 60% - that still leaves 40% of the country unable to view these games. Multi-Channel News, February 29, 1990.

The most recent NFL contracts for the first time include rights for both ESPN and Turner Broadcasting. ESPN's NFL package, worth $450 million, includes 13 prime time games and the Pro-Bowl. To recover the costs, ESPN announced an additional subscriber "surcharge" of $.14 per-subscriber.[61] The TBS package, also worth $450 million, includes 47 NFL games over the next four years.[62] NFL games are slowly, inexorably moving off free television. Unless action is taken today, the next round of television contract negotiations will see cable owning the rights to a significant, perhaps a majority, of NFL games.

---

[60] In 1989, there were 1,653 games on free off-air television. This will decrease to 1,639 in 1990. In contrast, the total number of games on regional cable networks will increase from 1,061 in 1989 to 1,137 in 1990. Broadcasting, March 5, 1990 pg 36.

Obviously, the decline in games off free television is not dramatic. It does demonstrate, however, that local free off-air television perhaps has reached its zenith with regard to covering major league baseball. There is every reason to believe this decline will continue. As one analyst noted:

> As a result of this changing business calculus, one clearly demarcated block of programming - Major League Baseball games - will start migrating in 1990 away from the national television networks and local television stations and over to local pay cable channels and a national basic cable network. It marks the first significant instance where relatively poorer non-cable households will have lost video access to programming which heretofore had been televised free by over-the-air broadcasting.

Lilley & Penner, supra n.3 at 29

[61] The surcharge is the best evidence of the subsidy that broadcasters give to cable operators. Games remaining on off-air broadcasting are retransmitted to subscribers by cable operators without cost. Because, cable is able to pass on the costs of this surcharge to its subscribers, it will not take long before cable programmers will outbid off-air broadcasting for the rights to NFL games.

[62]. Multichannel News, March 12, 1990, pg. 3.

College football has also been a significant source of sports siphoning. For example, the big 10 Game of the Week, which had been syndicated to local stations throughout the Midwest and beyond, is now the property of ESPN. Although some Big 10 games remain on network television, the ten weekly Big 10 games cannot be viewed by cableless fans in Iowa, Michigan, and the rest of Big 10 territory.[63] The same has happened to Ivy League games which are now on ESPN. Public television stations used to carry these New England rivalries.

The same holds true for other conferences. Turner broadcasting pulled the plug on local syndication of Southeast Conference Football. One school, University of Tennessee, seized upon the opportunity and has gone "pay per view". On the West Coast, Prime ticket has grabbed the rights to PAC ten football.[64]

---

[63] For example, in 1988, nine University of Iowa Hawkeyes football games were available free off-air television, throughout the state, on either local or network television. In 1989 only 3 Hawkeye games appeared on free broadcast television. ESPN presented only 1 of the missing 6 games.

[64] While Prime Ticket's contract does not preclude PAC 10 teams from selling television rights to local stations, it will largely have that effect. Essentially, Prime Ticket secured the second "window", or time period on Saturday. ABC has the first "window." During these two windows individual PAC 10 teams cannot televise other games on local television stations. Accordingly, it will be extremely difficult for local stations to buy PAC 10 games unless they can convince the Conference to reschedule games at an absurdly early -- or late -- hour. Of course the Conference was the entity who agreed to sell the two prime windows to entities other than local broadcasters in the

It is ironic that the taxpayers, who pay for these universities through their tax dollars, now must pay to see football.

B. Programming

We are also witnessing programming moving directly to cable television and by passing off-air broadcasting. For example, three major motion picture packages form Buena Vista, Orion and 20th Century Fox bypassed the broadcast syndication window going directly to cable.[65] Lifetime has acquired exhibition rights to "L.A. Law" and 79 episodes of "The Tracy Ullman Show". It is "the beginning of a trend of half-hour programming going to cable".[66] Moreover, because of existing agreements regarding residuals, local stations will continue to lose access to top syndicated programming series and movie packages.[67]

The exodus has just began. As time goes on, more and more top quality entertainment programming will leave off air broadcasting. Indeed, while television's share of Hollywood's revenues will decline in the next few years, cable's share of

---

first place.

[65] Broadcasting January 8, 1990, at 56

[66] Electronic Media, March 12, 1990 at 3, 55. Lifetime already has exhibition rights to such popular off-network hour programs such Moonlighting". Id.; Cableworld, December 18, 1989, at 15.

[67] Broadcasting January 8, 1990, at 56

these revenues will increase.[68]

It is important to realize that our complaint is not that Independent broadcasting is out bid for programming. Rather it is that the legal structure governing cable today insures that broadcasters will lose when they compete for programming. It is easy for cable operators to suggest that broadcasters simply did not bid for product or could not afford to pay the market rate for programming. However, Congress should look behind this simple marketplace answer to see if there are legal or regulatory impediments that distort the market.

We believe that the current regulatory environment -- or specifically lack of regulation in some areas but not in others -- distorts the marketplace. Ultimately, this distortion will spell the demise of free off-air broadcasting. The provisions of the Staff Draft amending S.1880 are essential to maintain a competitive balance.

V. THE CONSENSUS STAFF DRAFT RELEASED ON MARCH 9, 1990 PROVIDES A REASONED APPROACH TO CABLE RE-REGULATION.

INTV strongly endorses the "Staff Draft" released on March 9, 1990. The "Staff Draft" is a responsible effort at trying to provide balance to the marketplace. We applaud this Committee's work and its desire to correct these problems.

---

[68] By 1993 televisions share of expenditures for filmed entertainment programming will decline to 17.5%. Cable television's share will increase to 29%. Veronis, Suhler & Associates, supra, n. 18 at 83.

A. Must-Carry

The must-carry provisions appeared in Senator Danforth's original version of S. 1880. We wholeheartedly endorse the proposal. These provisions are vitally important to INTV specifically, and more generally to the survival of free off-air television.

Briefly, the bill requires cable operators that benefit from the compulsory license to carry qualified local broadcast signals. INTV endorses the definitions of "qualified commercial station" and "qualified local broadcast station" contained in the "Staff Draft".

We note, however, that this nation is expending significant efforts to develop terrestrial High Definition Television (HDTV). Development of HDTV is important for both our economy and defense capabilities. Given its importance, cable systems should be required to carry off-air signals in their HDTV mode. At the very least, off-air signals should be carried in the same fashion as their cable programming counterparts.

We believe the must-carry provisions are sound public policy.[69] Moreover, the legislation will pass constitutional muster. First, there is no required carriage per se. Instead, use of the compulsory license is conditioned upon the carriage of broadcast signals. The decision whether to carry local broadcast signals rests with the cable operator. This approach has never been presented to the courts.[70] In addition, we believe the factual record developed in the past few years supports a finding that "localism", as envisioned by section 307(b) of the Communications Act, constitutes a substantial government interest sufficient to support signal carriage obligations of the type contemplated by the proposed statute.[71]

---

[69] INTV has worked with the National Association of Public Television Stations to craft language that will ensure the carriage of this nation's public television stations. We recommend amending the language of the "Staff Draft" to reflect this agreement.

B. Channel Positioning

The "Staff Draft" does not amend the substance of the channel positioning requirements found in Senator Danforth's proposal. Basically, the bill would give local broadcasters the option to be carried on the channel position they occupied on, July 19, 1985 or "on channel" at the option of the broadcaster. Moreover, the" Staff Draft" would require that broadcast stations be carried on channels that can be received in all television sets. We support the provisions as drafted.

---

[70] For a discussion of the constitutionality of this approach, see Appendix G.

[71] It is important to remember that previous decisions did not preclude enactment of properly crafted must carry rules.

> We do not suggest that must carry rules are per se unconstitutional and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial government interests.

Century Communications Corp. v. FCC, 835 F.2d 292,304 (D.C. Cir. 1987) clarified 837 F.2d 517 (D.C. Cir 1988).

The tortured history of "must carry" in the past few years reveals that the FCC did not properly articulate the government's substantial, some would say compelling, interest in promoting localism. See Appendix A for a more thorough discussion of this issue.

These provisions are not obscure technicalities. They go to the heart of the broadcaster's problems with cable television. These provision eliminate the mechanism cable uses to behave in an anti-competitive fashion. There are several reasons for our concerns.

First, as previously noted, moving broadcast stations on to higher channel numbers, makes them inaccessible on many television sets. Cable subscribers can no longer access our signals unless they are willing to pay for an additional converter box. The problem is especially acute on second set hook ups, which generally are direct wired without a converter box.

The provisions are a necessary corrollary to must-carry. The ability to shift broadcast signals to channels that cannot be received on all television sets would, in effect, circumvent the must-carry requirements. You would have a policy where our signals are allowed to enter cable's monopoly pipeline with no guarantee of exiting. The public policy goal should be viewer to assure access to signals and not simply entry on a wire from which there is no exit.

The provisions are also consistent with the policy underlying the All-Channel Receiver Act. Consumers should not be required to pay for additional equipment simply to access UHF signals.[72]

We also support the provision giving broadcasters the option of being positioned on the channels they occupied on July 19, 1985. This date corresponds to the court's decision in Quincy, which struck down the must-carry rules.[73] It is after this date that cable began to exercise its monopoly power by shifting broadcast signals.

Simple equity justifies this provision. Cable systems originally put broadcasters on lower channel positions in order to market their product. We worked hard developing an audience on these cable channels. With a flip of the switch, we lost our audience. Of course, in most instances we were replaced by a program service on which the cable operator either had an equity interest or sold advertising.

I would point out that the so-called "on channel" policy spells disaster for local Independent broadcasting. First, an "on channel" policy is simply a ploy to justify further repositioning of broadcast signals. It would lead to massive repositioning of broadcast signals.[74] Second, technical problems prevent access on all television sets. Congress' interest should be to ensure that citizens have access to qualified local broadcast signals, that are carried on the cable.[75]

---

[72] Indeed, a clever cable operator could attempt to avoid the effects of rate regulation by placing broadcasters on channel positions that would force subscribers to pay for additional converters. Cable operators could make up for lost revenues by leasing additional equipment at higher costs.

[73] Quincy Cable TV, Inc. v. FCC, 768 F. dd 1434 (D.C. Cir. 1985).

Some have argued that broadcasters should just negotiate for channel position.[76] This is a bankrupt policy. Cable is a monopoly provider of access to the home. There is no other way to reach a cable household.[77] Accordingly, there can be no free market negotiations for channel positioning. Cable simply says no. We have no alternative.

---

[74] It must be remembered that leaders in the cable industry have attempted to restrain the industry from engaging in massive channel shifting. As noted previously their efforts have not been completely successful. Nevertheless, once legislation is enacted, and the scrutiny of Washington fades, cable's predatory nature will be unleashed. An "on channel policy" would simply be the excuse to trigger additional anti-competitive behavior.

[75] While the "on channel" policy has surface appeal, it has no relation to the underlying FCC allocation. The most important aspect of an FCC license is the assignment of interference-free spectrum to a local community. The key goal of localism is to provide a signal that can be received by viewers. Because an "on channel" policy would actually limit access to these signals, it runs counter to the Commission's goal of providing a fair and efficient distribution of spectrum as required by Sec. 307 (b) of the Act.

[76] If cable networks are unhappy with their channel assignment they have the option of denying the cable operator access to their programs. Because of the compulsory license, broadcaster's have no such bargaining chip.

[77] It is worth noting that the A/B switch is not a substitute for cable access. While both the Courts and the FCC appear to have embraced this purported solution, the record evidence proves that the A/B switch simply does not work. In fact, both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem. See Joint Petition for Reconsideration by NAB, NCTA and CATA filed in MM Docket No. 85-349 December 17, 1986; Joint Request for Stay Pending Reconsideration filled by NAB, NCTA and CATA in MM Docket No. 85-349, December 17, 1986.

There is absolutely no incentive for cable to negotiate with broadcasters for channel position. As a business entity, it is in cable's best interest to give superior channel position to its own programming services and/or those channels on which it sells advertising. As demonstrated previously, cable does not assign channel positions based on market demand, (i.e., subscriber preference). Absent regulation, there is no reason to expect them to do so.

Accordingly, we strongly endorse those provisions in the Staff Draft that would give broadcasters the option of being carried on the channel positions they occupied on July 19, 1985 and the requirement that they get carried on channels that can be received by every television set.

1) Channel Position: Complaint Procedure

One minor issue concerns the complaint procedure for resolving disputes over channel positioning. The Staff Draft would have these disputes resolved by local franchise authorities. We would recommend some minor changes.

It should be made plain, perhaps in report language, that there can be no dispute over the carriage of broadcast signals on the positions they occupied as of July 19, 1985. Carriage on these channels is, at the option of the broadcaster, a federal right and not subject to dispute.

Disputes should occur only in the more limited circumstances where it is impossible to carry a broadcaster on channel and the station was not carried prior to July 19, 1985. In these circumstances the broadcaster and the cable operator can negotiate for position subject to the requirement that broadcasters be carried on channels that can be received by all television sets.

We believe these disputes should be resolved in a federal forum. Broadcasting is a national system, and unlike cable, is not subject to local franchise requirements. Because channel position involves the federal allocations policy, the FCC should resolve these disputes. The Commission, not local franchise authorities, are experts in this field. Moreover, it would be more efficient to resolve these disputes at the FCC rather than trying to resolve them before several individual franchising authorities. Employing local franchise authorities to resolve these disputes, may create a patchwork of carriage on different channels.

C. Cable Concentration

We support the provisions that would delegate authority to the Commission to adopt rules governing vertical and horizontal integration for the cable industry. Enacting cable concentration rules is a difficult and complex task. We believe the expert agency is an appropriate forum to examine and formulate rules of this nature.

In this regard, INTV has already presented to the Commission a proposed rule that would curb the abuses associated with vertical integration. Ideally, there should be a complete separation between ownership of the wire and control over content. This proposal was made in 1974 by the President's Cabinet Committee on Cable Television.[78]

We recognize, that imposing a strict separations requirement at this time may be unrealistic. Accordingly, we have suggested a quasi-common carrier gateway approach. Cable operators would be allowed to own an equity interest in, or sell advertising on, one or two channels.

Presently, cable operators can sell advertising or own an equity interest in programming on all cable channels, creating adverse incentives to manipulate channel line ups. Our proposal would remove these anticompetitive incentives from most of the cable channels. It would create an incentive for the cable operator to program these channels based on subscriber preference as opposed to existing incentives. We believe the Commission and Congress should examine this approach.

---

[78] Office of Telecommunications Policy; a Cabinet Committee on Cable Communications, Cable Report to the President January 14, 1974. at 2. The Committee concluded: "We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications from the ownership and control of the programming or other information services carried on cable channels".

D. Rate Regulation

Generally, we support the concept. Our concerns in this area are triggered by a growing problem with sports and program siphoning. Costs are spread across the entire basic tier because the program service is sold as part of a package. Basic tier cable services are able to simply bid up the price of programming and recover these costs through increased subscriber fees. Because these services are part of the "basic tier" the costs are simply passed on to subscribers. Of course, subscriber demand for cable is not price sensitive, because there are no other competitive multichannel providers. The result is a continuing spiral of escalating costs. Subscriber bills increase and programming gets siphoned off free-television.

Against this backdrop is the single channel off-air broadcaster. We are limited to one advertising channel. Our advertising rates are subject to vigorous competition. We are unable to simply bid up the price of programming and pass on the costs. We lack the captive second income stream.

The bill envisions regulating the rates of all cable programming which contains advertising. By controlling the retail costs on these channels, the "Staff Draft" would benefit ratepayers and have the additional benefit of reducing program siphoning.

Absent this provision, cable operators would simply escape regulation by retiering their systems, creating a new "super basic" type service containing all cable program services to be sold as a package. The problems associated with passing on the ever escalating price of programming to captive consumers would remain.

E. Effective Competition

We support the Staff's definition of effective competition. INTV has always argued that the only effective competition to cable television is another multi-channel system. We would, however, draw the Committee's attention to one point regarding effective competition.

Analytically, there are two product markets. The first market involves a subscriber's ability to choose a competitive multi-channel service provider. From this prospective, cable is the retail monopoly provider of video services to customers. This market goes directly to the issue of rate regulation.

The second market involves access to television households. From this standpoint, cable is in the market of providing access to its subscribers. It is a monopsonist, acquiring program product for its pipeline. The existance of a second multi-channel provider does not necessarily provide competition in the market for access to cable households. This is especially true where you have several different multi-channel providers, serving different parts of the community. Accordingly, while the definition of effective competition is appropriate for triggering the need for rate regulation, it should be made clear that it does not obviate the need for must-carry or channel positioning requirements.

F. Elimination Of Franchise Requirements: Video Dial Tone

This is a complex provision triggering the entire debate over telephone entry into the cable business. The bill appears to create a situation known as the "video dial tone". In other words, telephone companies would be allowed to build switched broadband fiber facilities and lease or sell capacity directly to video programmers. Unlike the statu quo, telephone companies would be able to lease facilities to anyone wishing to provide programming. A franchise would not be a prerequisite for access.

INTV supports the notion of creating a multi-channel competitor to the current cable monopoly. Given our experience with cable, we support the notion that there should be strict separations between ownership of the wire and control over program content. As we have found, combining control of the wire and content creates a situation that is ripe for abuse. If telephone companies are eventually going to be granted entry into the video market, then the strict separations requirements envisioned by the "Staff Draft" are essential.[79]

---

[79] The "Staff Draft" does not address either the question of whether local broadcasters would be required to pay for carriage or the amount charged to subscribers for receiving broadcast signals. INTV believes that a broadcaster's public

G. Leased Commercial Access

INTV has presented testimony to this subcommittee on previous occasions detailing the problems in leased access. Simply stated, leased commercial access has not been an effective means of securing access to cable.[80] Its failure is due to the fact that Section 612(d) explicitly provides that in any action brought challenging the price, terms or conditions for leased access "the court shall not consider any price, term or condition established between an operator and an affiliate for comparable services."Precluding a comparative analysis of the terms of leased commercial access to other cable channels totally gutted the effectiveness of the provisions. The impotence of this section is evidenced by the fact that stations dropped from cable systems rarely used commercial leased access as a means of getting back on the cable. There is no evidence that broadcasters have been successful using this provision to gain access to cable systems.

---

interest obligations and a citizens right to receive information about its local community should be important considerations in the tariff process. Local broadcast signals should be considered a "lifeline" information service separate and distinct from other program providers. This is especially true given our statutory obligation to provide free off-air service to all people, including those who are not connected to the "wire".

[80] Oversight of Cable TV: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce Science and Transportation, 101st Cong., 2nd Sess (November 17, 1989) at 380 (Statement of Preston Padden, President, INTV).

The language of the "Staff Draft" corrects the failures of the existing statute. It requires that a certain number of channels be devoted to leased access and gives the Commission authority to review the terms and conditions of leased commercial access arrangements. We support this proposal.

H. Multiple Ownership Rules

We generally support the concept that cable operators should not be allowed to own competitive MMDS or SMATV systems in the same local market. The "Staff Draft" would, however, provide for waivers where the Commission finds it appropriate. We suggest that general guidelines be established to guide the Commission's analysis.

We would note however, that the standards used to define control appear to exceed the FCC's current standards for determining ownership.[81] For the sake of simplicity, perhaps the definitions of ownership currently used for other mass media services should be applied here.

The restrictions placed on DBS appear to be appropriate. Although, one may question whether allowing cable to have an interest in an infant DBS service creates an incentive to stifle future competition. Indeed, broadcasters were precluded from owning cable systems for this very reason. DBS should develop into a competitive -- not merely a complementary -- service to cable. Allowing large MSO's to hold interests in DBS at this early stage may be counterproductive to this competitive goal

---

[81] Pursuant to 47 C.F.R. Sec. 73.3555 an entity is considered to have an attributable interest when it owns 5% or more of voting stock. However, ownership at this level does not infer control. Moreover, determining equity ownership can be a complex task. For the sake of simplicity, the Subcommittee may wish to reference the Commission's existing rules regarding definitions of ownership. This will provide a uniform standard across all mass media services.

CONCLUSION

INTV believes that the Subcommittee Staff has done an excellent job in providing a reasoned approach to controlling the monopoly that is cable. We enthusiastically support their efforts and thank the members of this Subcommittee for their consideration.

Senator INOUYE. Before proceeding without objection, a letter dated March 28, 1990 from the Consumer Federation of America, the Consumer's Union and Public Citizen endorsing the staff draft of S. 1880 will be made a part of the record.

A letter from the director of Commerce and Consumer Affairs of the State of Hawaii dated March 28, 1990 endorsing the draft staff draft will also be made a part of the record.

In the March 12 edition of Multichannel News, there is a front-page story and the headline says, "Basic Cable Viewing Passes Broadcast Television in Total T.V. Homes." Is this T.V.'s future? Or is this an aberration?

Mr. FRITTS. Mr. Chairman, I have a somewhat historical and somewhat future-looking philosophy on what has taken place since the 1984 Cable Act was passed.

I think when it passed everyone said, well, I wonder what the effect will be. Will it in fact stimulate cable to be as prominent as they would like to be? I think we can look back six years now and say, there is no question that that has happened.

What you are contemplating today, and what you have spent so many hours on, is a look into the future. It's about how you can correct the marketplace so that new entrants, broadcasters and cable operators can continue to compete and maintain a viable future for the benefit of the American consumer.

There is no question that cable has completely become an overwhelming power because of their control of the conduit to the American home, as well as because of their cross-subsidization in terms of programming and the general regulatory advantages that they enjoy.

So I think that to be very candid with you, the future of free over-the-air, broadcasting indeed is in jeopardy, if the cable model is allowed to continue into the next five or 10 years without the corrections which you are contemplating. And obviously we applaud you for that.

Mr. HEDLUND. Mr. Chairman, I think the headline is a little misleading. Although I think you are correct in saying that probably is a look into the future if things are not changed.

Viewing to all of the 196 different cable program services—which I find interesting enough, the cable operators refer to as their programs, even though in many of these cases these are independently owned and competitive cable networks—the viewing to all of those put together maybe on a good day adds up to 15 percent of all television viewing. The bulk of all television viewing is disproportionately to local broadcast television stations.

But that is clearly beginning to change, as we have testified heretofore, as the cable industry basically takes the revenue that the carriage of local broadcasters earns for them and provides a cross-subsidy to cable program services, which in turn use that money to bid away popular programming, such as the New York Yankees and NFL Football, that very gradually people's viewing will be forced onto these cable channels.

Senator INOUYE. Mr. Fritts, could you set a standard to determine whether cable system is facing effective competition?

Mr. FRITTS. Mr. Chairman, I think this is an issue that we have thought long and hard about over a long period of time. And we obviously have had dialogue with a number of people who are experts in this area.

And I would just suggest to you that the effective competition definition outlined in the staff draft hits the nail right on the head.

Senator INOUYE. You are satisfied with that standard?

Mr. FRITTS. Very much so.

Senator INOUYE. Mr. Hedlund.

Mr. HEDLUND. I agree, Mr. Chairman.

Senator INOUYE. The staff draft of the bill includes a provision requiring cable systems to carry local T.V. stations within 50 miles of their principal head ends.

Why was this increase for 35 miles to 50 miles. Would you object to going back to 35 miles?

Mr. HEDLUND. I at least would. Mr. Chairman, the original must carry rules which were struck down in 1985 started with a 35 mile radius, and then allowed stations to be carried on cable systems in areas where they were considered significantly viewed.

Now without getting into detail about that, the vast majority of stations had must carry carriage out well beyond 35 miles. There was another rule that applied in so-called hyphenated markets.

The 50 miles was basically a compromise that for most stations would represent less carriage. Nonetheless when we negotiated that with the cable industry back in 1986, that seemed like a reasonable number. But 35 miles would substantially reduce the carriage of the vast majority of local stations, independents and affiliates alike over what the original rules provided.

Senator INOUYE. Is that your thought, sir?

Mr. FRITTS. It is indeed. And I might point out that the cable industry has agreed that 50 miles would be an appropriate circle for must carry.

In most markets 50 miles does not cover the entire market area of a television station. So even by setting 50 miles we are accepting less than coverage of the total service area for most television stations.

Senator INOUYE. What do you think of the concept, if carry, must pay?

Mr. FRITTS. Well, Senator, we think it is a terrific idea.

Mr. HEDLUND. Senator, I join my friend and give a great deal of credit to NAB for the leadership it has shown to bring all of the broadcasting industry together behind this bill.

I would just add—because the idea has been in some people's minds dismissed as just a ploy of greedy broadcasters—one of the oldest and largest members of our association is Channel 11 in New York City, which since 1948 has carried the New York Yankee games free of charge to everybody in the New York area.

They have done that for 40 years, carrying often times over 100 games a year. Starting next year, in 1991, all of the 162 New York Yankee games are going to be on a pay cable service.

And the reason is that when George Steinbrenner had the Yankee T.V. rights up to bid, Channel 11 of New York bid its heart out, but they were limited by how much advertising and the value of that advertising they could sell on the games. That is all they have as a source of revenue.

Madison Square Garden Network also sells advertising. But it basically took the position that it would bid whatever it took to get the games because whatever the shortfall was, you would stick it on the cable subscriber. And the cable subscriber would pay.

And, you know, there has got to be some change made, or that is going to be the pattern of the future. More and more of the programs that people have become used to seeing on free T.V. are not going to be there any longer.

Mr. FRITTS. I agree with Jim. And I might point out, Mr. Chairman, that the cable industry itself has commissioned three different studies to try to find out or determine the value of the local over-the-air television stations to their sales of subscriptions.

One study indicated that the average value of the broadcast signals to a cable system was from $2 to $5 per month per subscriber.

The other study done for United Cable, shows that out of a $15 basic fee, from $3 to $5 would be allocated as the value of the over-the-air stations. And the Kagan study indicated something higher, nearly $7 as I recall, or 56 percent of basic revenues, should be attributed to the carriage of local stations.

I would just simply point out that for years these services have been provided free to cable systems, which have turned around and sold them for rather substantial profits amounting to what we consider to be a rather substantial subsidy provided to the cable industry through the years.

Senator INOUYE. How much would the cable subscriber in New York have to pay to watch the Yankee games?

Mr. HEDLUND. I think it will be hard because it will be bound up in an overall rate and will not be stated as a separate price. But I suspect it would be rather substantial.

It was a very large bid for the rights to those games. Because cable penetration is about 50 percent in the area, there are 50 percent of the homes who cannot see it even if they wish to see it and, therefore, the advertising cannot be seen by this group. So they have to make up a $500 million bid for those rights among a relatively limited number of people. I do not know what that will work out to be, but I can tell you that it has to be substantial.

Senator INOUYE. Thank you.

Senator Burns.

Senator BURNS. Thank you, Mr. Chairman.

As you both know, Senator Danforth's bill and the staff draft links cable's compulsory license to the acceptance of must carry rules. I know you endorse this concept.

Can you explain to this committee why you think that this is important for both policy and from a both policy and constitution perspective?

Mr. HEDLUND. Well, you know, while we may believe that the Circuit Court for the District of Columbia was wrong in striking down the must carry rules before—and we do—nonetheless they did. And the issue came back to the idea that it was mandatory carriage.

And so we have simply taken the position that whatever cable's First Amendment rights or the degree of those First Amendment rights may be, they cannot argue that they have a constitutional right for the government subsidy of a compulsory copyright license for the use of someone else's programming and that it only seems fair that there be a tradeoff.

This is a Federal benefit, and the Federal Government is simply saying: Here is a benefit, but there are conditions attached to that benefit. If you do not want the benefit of a compulsory license, fine, but then expect to go out in the marketplace and negotiate for the rights to retransmit those signals yourself.

And so I think it is constitutionally more secure. Frankly we would have preferred the must carry rules as they existed back in 1985, but that issue has passed us, and we are trying to grapple with something that appears to keep the lawyers happier.

Mr. FRITTS. I agree with that.

Senator BURNS. I happen to believe that both of you have represented an industry that I think is an absolute must and has served this country pretty well as free, over-the-air broadcast, and I fully support you with regard to the channel position issue.

Jim, can you tell me just for the record what your attitude is toward the NCTA's on-channel carriage position?

Mr. HEDLUND. Thank you for asking the question.

As a matter of fact, the problem with on-channel carriage comes in a number of respects. One is the average cable system today has about 32 channels. There are more than half of the UHF television stations, most of whom are my members, with channel numbers higher than 32 and so it is a physical impossibility to carry them on-channel to start with.

Secondly it is very common in the cable industry now that your friendly cable operator comes in the door and they hook up your cable to say the set in your family room—that is the fancy one—and they have a converter on it, and that converter allows you to access all of the channels on basic service. And then they say since we are here and we want to be consumer-friendly, we will, free of charge, hook up all the other television sets in your house with cable.

Now, if you want a converter on it, you understand it is going to cost you another eight or nine dollars a month but, we can hook the cable directly to the back of your T.V. set, and then you will receive all of the cable services we provide on channels 2 through 13.

A lot of people take that option because cable is already expensive. It is spending four, five or six bucks for every additional set in the household can be expensive where that happens.

Our signals, even if they are sent down the line on, say, channel 18, do not come out the other end. We depend on children for a lot of our viewing. Almost every independent station programs to children on weekday afternoons.

Most or a great deal of the viewing by young children does not take place on the primary set. So when these kids get home from school, they may go down to the rec room or their bedroom or wherever the set is that used to be in the living room, and you put downstairs for the kids, and that has 12 channels of cable on it which does not sometimes include the local stations. And if they are not there, the kids just watch something else.

The final issue is that many years ago cable took some of the established stations and, for their own reasons, might have taken a

UHF station and put it on channel 6 and it might have stayed there for years. The broadcaster would go out and promote the fact that on channel 22 over the-air, but cable channel 6. Then cable comes along with a financial interest in these program services. They sell advertising on them. Oftentimes they own a piece of them. They say channel 6 is a nice position, I think I want that, and so off goes the local broadcaster who may have lived there and made that his business address for 20 years. He is gone, poof, not because it is in the consumer's best interest, but it is in the cable operator's best interest bottom line-wise.

Mr. FRITTS. I might mention, Senator Burns, in addition to Jim's very accurate outline of what is happening in today's marketplace oftentimes these channels are switched with no notice or very short notice. Through the years the station builds and puts a lot of money into promotions saying that we are located on channel whatever it may be.

As a result, for instance, one station in San Francisco was moved four times in one year. For people who like that station, it is difficult, number one, to find them and, number two, in some instances if they do not have a converter box, they cannot get them at all.

And so in essence it is a way to freeze some people out, albeit maybe unintentionally.

Senator BURNS. I just have one last question and, by the way, I want to thank each of your staff for being very cooperative with us in trying to address this very difficult problem, and you have just been marvelous as far as we are concerned.

Do either one of you, if the thrust is towards rather than regulation, is towards competition and trying to develop competition—and I will state this—I have my doubts about the DBS thing really offering that much competition for the simple reason that television in the local interest and doing local service is hard to get on DBS for Great Falls, Montana. That is sort of like politics. All politics is local, too.

Do you have an attitude on Telco entry into the cable business? Have you formulated any? I would just be interested in knowing what your attitude would be towards that.

Mr. FRITTS. On the general notion of competition for cable—and there has been a lot of talk around this table—I guess in the best of all worlds competition would be the most desirable answer. Unfortunately, we are not living in the best of all worlds.

Our position on Telco entry is pretty simple. We believe that Telco entry, as addressed in the staff draft, is just fine. Bring them in as a common carrier, and let them provide service in competition as a transport mechanism to cable, but do not let them into programming. You only have to look to their size.

Now, it was not long ago that "Ma Bell" was broken up, if we can all remember that. You could look at what has happened to the so-called "Baby Bells" since "Ma Bell" was broken up. They are huge, huge industries. Any two of those are larger than the entire cable industry combined. Any three of them are larger than the entire broadcast industry combined.

We have great concerns about replacing one monopoly with another monopoly. If we had our druthers, we think cable should quite frankly be a common carrier in the best of all worlds. But we do not think that clock is going to be turned back. So we have great concerns that the Telcos, if unleashed, could provide a disproportionate amount of influence and, quite frankly, that no one could compete with them. And so that is a problem with us.

And I guess more fundamental is the technology. While everyone is trumpeting, gee, let us get this done for America, let us get this done for competition, the fact of the matter is that if you were to decide today that Telco could be a full-fledged competitor, you are looking at least a decade ahead before it can become viable in the marketplace.

And their first area of interest is going to be in those affluent areas, not in the rural areas, because if it is not feasible to run a cable to those areas, it sure is not feasible to run fiber optics to those areas.

So there are a whole list of our concerns, and we would be glad to provide more details on them to you.

SENATOR BURNS. Thank both of you gentlemen very much. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Danforth.

Senator DANFORTH. Mr. Chairman, I have no questions. Thank you very much.

Senator INOUYE. I have a rather obvious question. The answer is obvious, but I would like to know the reasons why.

Why is it in the national interest to maintain a strong and viable over-the-air free television?

Mr. FRITTS. As Eastern Europe is changing from their current form of government and their current form of communications, this is happening all over the world, quite frankly, even in Western Europe with new privatization, their people are coming to America. They are coming to the United States, to Washington, D.C., to NAB and other institutions around asking us how has our system developed, how does it work so well, a locally based system serving daily the local needs of all of the citizens and every community? How do you do it and then interconnect, in some instances, with networks and other programming services?

We think the American people have a great stake in our system of broadcasting, which serves their community on a day-by-day basis with public affairs, local news, weather. And to Senator Burns' point, I agree with him that a failing of our current DBS proposals is that they do not tap into the local market, and DBS has no way to interconnect into the local market.

That system, Mr. Chairman, is in jeopardy, and we think it is important to preserve it for the future. And I believe you believe it is important to preserve it for the future as well.

Senator INOUYE. Do you agree with that?

Mr. HEDLUND. Mr. Chairman, that was so eloquent I think all we needed was some violin music behind it. I have nothing to add.

Senator INOUYE. On behalf of the committee, Mr. Fritts, Mr. Hedlund, I thank both of you very much.

Mr. FRITTS. Thank you, Mr. Chairman.

Senator INOUYE. Our next panel consists of Mr. Henry Geller of the Markel Foundation, Mr. Allen Garner, Esquire, of Jefferson

City, Missouri, and Mr. Joseph W. Hipple III, Chief Operating Officer, People's Choice TV of Illinois.

May I call first upon Mr. Garner.

STATEMENT OF B. ALLEN GARNER, ON BEHALF OF THE MAYOR AND CITY COUNCIL, JEFFERSON CITY, MO

Mr. **Garner**. Thank you, Mr. Chairman. I am here on behalf of the Mayor of Jefferson City and the City Council. Also, in light of the makeup of the panel, to some extent I represent many small towns, and I have dealt with others.

First, I would like to assure you that I will try to refrain from cable bashing although as I sat and listened to the first panel, I was somewhat subject to city bashing where my clients were characterized as irrational, in need of detailed instruction or, the worst choice possible and were tumultuous as well as being political. I am not sure that the last one is necessarily a negative.

I would also welcome some questions at the conclusion dealing with certain statements that I believe were not necessarily correct.

Jefferson City is the capital of Missouri with a population of about 38,000 people. Two-thirds of those people are served by TCI. We have a non-exclusive franchise, but we have been found by a Federal court to exist in a natural monopoly. It is not reasonable to expect another company to come in and compete with TCI under current regulation.

Either regulation or competition must exist. Competition does not presently exist. Therefore, we need Congress to address the issue to protect consumers from unfair pricing, poor service, and less than adequate programming.

On behalf of my clients I would recommend to you that municipalities are best situated for regulation of cable rates and practices and should be left in the hands of local officials.

Jefferson City's first experience with cable was in 1967 with the grant of the first franchise. TCI bought the franchise in 1977. In 1980 in anticipation of the expiration of that franchise, the city requested proposals from interested parties to provide the service. The main outgrowth of that experience was a nightmare of threats and litigation.

There were threats made specifically directed at a consultant hired by the city. There were threats made to flood the Jefferson City market with satellite dishes. There was an announcement to the public that all cable television service would be terminated unless the franchise was renewed. The company refused to pay past due franchise fees and filed a lawsuit against the city.

In the face of that, a franchise eventually was granted to TCI, which resulted in still more litigation brought by an unsuccessful applicant on the basis of conspiracy to unreasonably restrain trade, actual monopoly and tortious interference with a business expectancy.

A jury eventually found in favor of the plaintiff and awarded damages in excess of $35 million. Even though the city had settled with the plaintiff prior to the jury hearing the case, we were sued twice by TCI seeking contribution towards payment of the judgment.

With that experience behind us it was not with great hope that we approached renewal of the franchise during 1986 under the current legislation. In addition to an expense of over $200,000 from the prior renewal process, we still had poor customer service, a high number of consumer complaints, and dissatisfaction was high.

During the renewal process what influence had been left to local governments was at its peak. We used that influence to finally gain installation of channel capacity that had been promised six years earlier.

While the number of channels and customer service had improved, the next experience we had was the rate increases you have already heard about. Our specifics were $6.55 in 1981 will be as of May 1st $21.45.

To put in perspective what some of the earlier witnesses said, if you just look at the last three and a half years, we have experienced a basic rate increase of 186 percent.

Another illustration I would put before the committee has to do with absorption of an adjoining city, Cedar City, by Jefferson City.

Cedar City was not served when we consolidated with them. One of their requests was to try to obtain cable service. TCI responded that they were not interested. They had negotiated in the franchise renewal a physical barrier exception. They declared the Missouri River to be such a physical barrier. Their position remained unchanged until we received a proposal from a second company to go in and serve this area. Almost immediately TCI reversed their position and said they would be bringing a proposal to us to provide service. We have yet to see that specific proposal.

We have witnessed the city's position from both a competition standpoint as illustrated in the Cedar City example, and the lack of competition which can best be illustrated by our rate situation.

Finally I believe it would be our position and is also the position of the National League of Cities that in the absence of true competition regulation needs to be reestablished, and it should be established on the local level. Thank you.

[The statement follows:]

TESTIMONY OF
B. ALLEN GARNER
CITY COUNSELOR

Mr. Chairman, on behalf of the Mayor and City Council of the City of Jefferson, Missouri, I want to thank you for the opportunity to appear before you today. My name is Allen Garner. I am the City Counselor for Jefferson City and have been designated to speak on its behalf and on behalf of the citizens of Jefferson City. This Committee and Congress should be congratulated and supported for conducting a review and proposing corrections to the 1984 Cable Television Act.

Jefferson City, the capital city of Missouri, has a population of 38,000 people with over two-thirds served by TCI under a non-exclusive franchise. It is not reasonable to expect another company to come in and compete with TCI under current rules. Competition must exist before programming or rates are left to the marketplace. Competition does not presently exist in Jefferson City, therefore Congress needs to address this issue to protect consumers from unfair pricing, poor service and less than adequate programming. Municipalities are best situated for the regulation of cable systems' rates and practices and these should be left in the hands of local officials. As preface to testimony concerning legislative action before the Committee, a review of the experience of Jefferson City may be helpful.

Jefferson City has been served by cable television since 1967. The current operator, TCI Cablevision of Missouri, Inc., acquired the only system in town in 1978 from International Telemeter

Corporation. By its terms, the franchise which TCI purchased was scheduled to expire in April, 1981.

As is customarily done in cities across the country, Jefferson City initiated an RFP process to solicit bids to determine the recipient of the next cable television franchise. While TCI enjoyed the inside track in the competition for the next franchise, city officials remained open to the option of refusing to renew TCI's franchise, particularly in view of mounting consumer dissatisfaction with existing service.

In 1980, a group of local investors formed a company Central Telecommunications, Inc. (CTI) for the purpose of seeking a cable television franchise in Jefferson City. Aware of the public's dissatisfaction, CTI began arranging financing and responded to the city's RFP by offering services for less money. TCI refused to participate directly in the RFP process. Instead, TCI undertook various activities designed to ensure that it could not be displaced as the sole cable television franchisee in Jefferson City. Many of these activities were performed by Paul Alden, a TCI employee. For example, Mr. Alden threatened to destroy the career of Elmer Smalling, a consultant who was evaluating the RFP responses for the city. Mr. Alden also attempted to intimidate city officials by threatening to flood the Jefferson City market with satellite dishes if TCI's franchise was not renewed. In addition, TCI sent shock waves through the Jefferson City community by announcing to the public that all cable television services would be terminated unless its franchise was renewed. Defendants applied additional pressure on city officials by refusing to pay the city approximately $60,000.00 in past-due franchise fees unless and until their franchise was renewed. Finally, on March 16, 1981, TCI filed a multi-count lawsuit against the city based on the First Amendment and began to engage the city in protracted litigation.

On April 20, 1982, the city council voted by a 7-3 majority to award a non-exclusive franchise to plaintiff. Mayor Hartsfield promptly vetoed the ordinance granting a franchise to plaintiff. The next item on the council's agenda was a proposed ordinance which would renew defendants' franchise. The council was deadlocked at a 5-5 vote. The mayor cast the tie-breaking vote and, as a result, TCI retained its position as the only cable television operator in Jefferson City.

Contending that it had been wrongfully deprived of a franchise, CTI brought a lawsuit. TCI counterclaimed. TCI submitted its case to the jury on three theories: (1) conspiracy to unreasonably restrain trade; (2) actual monopolization; and (3) tortious interference with a business expectancy. After thirty-one days of trial, the jury found for CTI under each theory and awarded damages of $10,800,000 on each antitrust claim and $10,800,000 actual damages and $25,000,000 for punitive damages for tortious interference with a business expectancy.

The City, after incurring significant litigation costs, agreed to an out-of-court settlement prior to submission to the jury and was dismissed from the case. Even though the City had settled with the Plaintiff, TCI twice commenced further litigation against the

City to obtain contribution and pursued those cases through the appellate court level. The net cost to the City was in excess of $200,000.00.

With this background, it was with some trepidation that the City approached renewal of the franchise during 1986 and 1987, under the auspices of the 1984 Cable Act. In addition to the expense of the prior renewal process, customer service was poor at best, consumer complaints were high, dissatisfaction with the company and resentment over the prior behavior was rampant. During the renewal process, the time under the 1984 Act when local government influence was at a peak, the first improvements to the system, some of which had been agreed to and promised years earlier, were made. An upgrade of the system occurred with channel capacity increasing to reach the level of service promised in 1981. Cable which had lain across the ground was buried in something approaching a timely process and response time to consumers was significantly shortened.

While the number of channels and customer service improved, the next results following renewal was increases in rates. Monthly charges for basic service in Jefferson City have risen from $6.55 in 1981 to a cost as of May 1, of $21.45. In the last 3-1/2 years cable rates have increased 186%. Through the local franchise renewed in 1988, the City established a Cable Quality Commission to monitor customer service complaints and other activity of the Company. Significant provisions calling for monetary penalties from the Company were included which have been effective. Their very existence altered the way in which the customers are treated. One can look at Jefferson City's complaints and service response time, compare it to customers of the same company immediately outside of the franchise area and note significant differences. The Cable Quality Commission was also instrumental in obtaining a true "super" station in 1988.

Another illustration of problems within the current makeup of cable regulation and a demonstration of the impact of competition, can be found in a small area recently added to the boundaries of Jefferson City. For many years a small community, Cedar City, existed on the northern boundary of Jefferson City. The elected officials of that community approached Jefferson City to investigate the possibility of joining the two communities. During those discussions, the issue of cable television was raised and concern expressed that the citizens of Cedar City desired to be served by a cable company. TCI was made aware of this request. In anticipation of this request TCI had sought a provision in the renewed franchise that if physical barriers, including rivers, existed between the main part of their service area and another area, they could refuse to provide service based on a hardship.

After the two cities were consolidated, TCI refused to provide service on the grounds the number of customers did not justify expansion across a physical barrier, the Missouri River. This continued to be their position until a second cable company approached the City with an offer to serve the area, but with no intent to go head-to-head with the largest cable company in the

United States for the remaining parts of Jefferson City. As with many franchises, there were provisions in the existing franchise that required any additional companies to provide service to the entire City. A part of the franchise that TCI was insistent upon and promoted as an issue of fairness.

Following the approach by the second cable company, the City asked for more specifics on what service would be provided and any requirements for franchise modification to allow service. Immediately following this overture by the City, TCI's position on serving this community took a sudden turn and an announcement was made to the Cable Quality Commission that service would be provided in some fashion with a proposal to follow. While to date no proposal has yet been received the threat of a competitor was necessary to cause service to be provided.

With the history Jefferson City has experienced and the significant cost involved in the legal arena over cable television, one might believe this unit of local government is prepared to withdraw from the cable field. Neither the constituents served by the elected officials nor the elected officials believe that would be appropriate. In fact, the experience has made the community more determined to remain an influence in cable television.

Jefferson City has experienced first hand the impact of both competition and the lack of competition upon the behavior of a cable company. Competition does not exist in over 95% of the communities in this country under current rules. True regulation does not exist in 95% of the country, leaving customers at the whim of what have become corporate giants. Competition can be encouraged and promoted and when it becomes a reality, many of the problems may be solved. In the interim regulations must be placed upon franchise operators with local government providing the local rules upon a level national playing field established by Congress.

The basic concepts of federalism upon which this country was founded mandated that each level of government should do that which it does best. With respect to cable television, the Federal government and its agencies should establish a national telecommunications policy, a level playing field, and cities should be free to obtain for their citizens services and rates for which they contract when issuing cable franchises. When the Cable Communications Policy Act of 1984 was passed, the Congress and the cities, hoped the legislation would encourage technological advances and increased competition with significant improvement in cable service at reasonable rates. Experience demonstrates the hopes were misplaced. Cable television corporations have evolved into monopolies answerable to no one least of all to the public they serve.

The federal government should establish national minimum standards of technical and programming services, guaranteeing to cable subscribers that they will receive a basic quality and level of cable service but preserve the opportunity for cities to negotiate a specific arrangement more suited to local consumers. A local responsible agency can better monitor the local programming need and desires of the community at a rate structure justified by the Consumer Price Index and local improvement costs.

The cable industry now objects to the multiplicity of franchising authorities characterizing the number as an undue and unfair burden upon them. This complaint was not heard prior to 1984 when the same conditions existed.

The relationship between governmental units should effectively protect our citizens. The most effective tool cities have is the potential for non-renewal of a franchise. As the law stands the procedures required for non-renewal are so burdensome for the issuing authority and time consuming that non-renewal is not a viable option. No one else can best determine the needs of its own community, than the individual community itself. How the cable operator can meet the needs of local consumers must remain a local decision.

Concerning rates, the current definition of "effective competition" is unrealistic and should be changed. First, broadcast signals are not substitutes for the multi-channel offerings. Rate increases since deregulation are the best evidence that effective competition does not exist. By May 1, rates in Jefferson City will have risen 186% since 1986. That bears no relationship to the rate of inflation. Similar increases are reported throughout Missouri.

Effective competition should be redefined in such a manner that a second, multi-channel video provider with a significant market share is a requirement for a finding of effective competition. Rate regulation should be by local officials who grant the franchises, and have a strong interest in financially prudent cable operation.

Consumers need a place to turn when confronted with service abuses. Local government receives and attempts to resolve cable complaints. Federal resources are not suited to this, nor are state agencies. Restrictions on the renewal process should be removed. Poor performing operators should face the real prospect of non-renewal and replacement by another operator. This is a form of competition.

While competition would address many concerns in a more palatable means than regulation as a method of improving customer satisfaction, it is an ideal not a reality. The viability of local broadcasts as competition is significantly reduced by local terrain. The phone companies are prohibited from participation and the market is too small for multiple cable operators under current technologies.

Consumers and local government are frustrated. The consumer may purchase from only one provider who may adopt a "take it or leave it" attitude. Local government has limited leverage after the passage of the 1984 Cable Act. The Federal Communications Commission is too remote. Local authorities should not be further removed from the administration and enforcement of their franchises. Local authorities must remain involved in the cable franchising process.

We sincerely hope that these deliberations lead to either reasonable regulation by local governments or true competition, or a combination thereof which provides protection for consumers.

SUGGESTED POWERS NEEDED BY CITIES

Cities need the power to:

* Regulate rates within reasonable bounds, perhaps tied to the consumer price index.

* Require service extension.

* Require the provision of technology in excess of the "national" standards.

* Require minimal levels of channel capacity and programming suitable to the individual community.

* Utilize practical procedure for non-renewal of a cable franchise for failure to perform.

* Regulate transfers of ownership.

* Determine changes in the mix, level and quality of programming services.

* Control the retiering of channels.

* Guarantee that an acceptable level of customer service will be maintained.

* Require cable companies to indemnify cities in matters pertaining to the first amendment.

Senator **Danforth**. Thank you very much, Mr. Garner.

Mr. Geller.

STATEMENT OF HENRY GELLER, MARKEL FOUNDATION

Mr. **Geller**. Thank you, Mr. Chairman. Because the hour is late I would just comment briefly on some of the matters that have come up in the last couple of hours.

Senator Gore referred to the episode involving NBC and CNBC where because NBC spends about $250-$300 million a year on news and recognized that cable was the new moving video force, it wanted to enter cable with a competing 24-hour news channel that would be very much in the public interest. You would not like to have just one network news operation, ABC. You want CBS and NBC also, and similarly it would be good to have competition to CNN. That proposal was rejected by TCI and the other MSOs, and that was the end of it.

But I want to go further and point out that it really shows that there is a complete deficiency in the 1984 act. The 1984 act has as a base, as a linchpin, leased channel access. It said that for systems with 36 or more channels, 10 to 15 percent of the channel capacity should be made available on a leased channel basis.

When it was turned down NBC did not turn to leased channel, and there is a good reason. Those provisions in section 612 are so hedged that they are absolutely worthless. I suggest to you that that is a smoking gun and that what you have to do is repair section 612. You said it was terribly important to diversification, and you are not getting it. As to the way to repair it, I believe that the staff draft addresses it, but a better way to do it is to say that if there is no agreement on terms and conditions, then the parties turn to last offer compulsory arbitration. That emulates the marketplace as much as you can and it results in the cable programmer like NBC getting on immediately and then you argue about the terms with this compulsory arbitration process.

A second area that came up when the Committee was dealing with "may carry, must carry, must pay" was the must carry provision. And Mr. Mooney and Mr. Hostetter said quite correctly that cable has been encouraged to be a community antenna, a local antenna service.

But if you are a community antenna, a local antenna service, you ought to carry all of them, not just some of them. If here in Washington, D.C. you carried all of them but channel 50 or channel 32, channel 50 and 32 would be dead because the cable operator is saying to subscribers: "I brought you the popular programming; you do not have to worry, about the cost." No one will use an A/B switch or an antenna to get those two missing channels.

If cable is going to be a community antenna service, it is anticompetitive if it does not do the job fully—if its says that it has limited channel capacity, and is going to eliminate some local signals.

Congress passed the all channel law in order to have channel 50 and 32 make it or lose out in the marketplace, not to have a cable operator decide that. So I suggest to you that while your staff draft correctly addresses the must carry point, it ought to say that the cable operator does not have to carry broadcast signals, but if it decides to do so, it must carry all the qualified local signals. If they cannot do the job by expanding capacity, they ought to get out of the way and let somebody else like a telco or another over-builder come in and do it.

But if cable decides to act as a community antenna, they must act in a competitive fashion by putting all the local stations on a single tier, on their channel and in according order, and have nothing else on this tier except the PEG channels. You will have unbundled that service, made it available very reasonably and very cheaply; this is fair to the consumer and much fairer to the broadcast industry.

And finally there was reference made by the cable witnesses to the fact that exclusivity is normal and perfectly reasonable in this business. That is so. It is reasonable and normal. But for the last decades cable has had a compulsory license for distant signals.

In the last decade it had it without any syndex protection. It still has a compulsory license to bring in distant signals, many of which have sports programming and other valuable programming.

In the negotiations that you are going to have with cable, you ought to ask them why do they have a compulsory license for distant signals and why, if they have a compulsory license, should not cable programming be made available to MMDS on that basis. Either cable should give up the compulsory license or I suggest you ought to make cable's programming available to competitors like MMDS, using last offer compulsory arbitration, and sunset this after seven years.

The final point I would make is that all these are short term efforts to deal with cable as a monopoly gatekeeper—within the horizontal and vertical questions.

The long-term solution is a common carrier—a fiberoptic, broad band highway into the home. It will come very slowly. We are really talking about telco entry. I think the staff draft correctly has a provision that helps telco entry, but beyond that I suggest strongly that since the Telco is up against an entrenched competitor, you ought to allow it some amount of content, five channels or less, but some amount.

If you wanted to, you could even acquire divestiture after a period of time. But if we do not start now to promote that telco entry, which will come slowly over a generation, we will arrive at 2010 and bemoan the fact that the structures is one that still does not allow video publishing over a common carrier. For video, you want eventually what you have in print, where you have magazines going over the Postal Service.

I will stop there. The point I would make is that you adopted safeguards in 1984 act. They proved ineffectual. The staff draft correctly tries to collect the deficiencies, and I urge that you do so. Thank you.

[The statement and questions and answers follow:]

STATEMENT OF HENRY GELLER
BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS
ON PENDING PROPOSALS TO REVISE THE 1984 CABLE ACT

March 29, 1990

My name is Henry Geller. I am a communications fellow at the Markle Foundation and a professor at Duke University. The views expressed are my own.

Congress sought in the 1984 Cable Act to set out a broad charter for the governmental regulatory role as to cable television. Wisely, that charter largely eliminates governmental supervision of the programming presented over cable, leaving the development and manner of presentation of such programming to the marketplace. Congress recognized, however, that the cable operator's control over so many channels into the home did raise serious diversification problems. The Congressional report thus stressed the need to promote the Associated Press principle -- that the underlying assumption of the First Amendment is that the American people receive information from as diverse and antagonistic sources as possible. The 1984 Act does this by allowing the franchising authority to require public access channels on systems with 36 or more channels. And finally it permitted regulation of the basic rates charged by cable systems where the FCC finds that there is an absence of effective competition.

One main purpose of the Act has certainly been fulfilled: Cable has flourished under the deregulatory policies, and is now the strongest growing sector of the video industry. That growth has brought greater diversity of programming to the American people. The trend in video is to cable, a pay service, and not to the over-the-air television system.

The safeguards of the Act, however, have been a failure. The leased channel provision is a dead letter, because of the way it is skewed in cable's favor. Public access, while making a contribution in several areas, has not flourished as it should, because the Congress turned a cold shoulder to the sound proposals of then Chairman Wirth for use of the 5% franchise fee to support such access, locally and and nationally (Letter from Rep. Wirth to the House Energy and Commerce Committtee, Feb. 15, 1984). And the Fowler FCC, which never saw a regulation it liked, swept aside the cogent arguments of the cities and the Department of Justice that effective competition existed only if the cluster of services found in cable were available effectively in some competing medium, and eliminated virtually all regulation of the rates charged for basic service.

The consequences of these failures have been set out in other testimony or Statements to this Subcommittee and to the FCC in the March 1 filings. It would be inappropriate for me to go over my own 70 page submission to the Commission. Let me just note here some examples of these policy failures, all stemming from the fact that in this decade cable will be the way into at least two-thirds of all TV households for video programming, that there is substantial horizontal concentration (TCI, controlling the programming received by 24% of all cable subscribers; Time-Warner, 13%), and that there is substantial vertical integration (ownership links between the large MSOs and most of the important cable programming services).

First, take the problem of a putative cable programmer. CNN, the 24-hour cable news channel, is a wonderful development, for which Ted Turner deserves great credit. But it clearly would not serve the diversification principle if there were only one commercial TV network news programmer -- say, ABC, with NBC and CBS "parked out." Just as clearly, diversification would be served if there were competing 24-hour news channels on cable. Whether they succeeded would be determined by the viewing public and the marketplace. The three major national networks are logical candidates to supply such a competing service: They already spend enornous sums to gather the news for their present over-the-air operations (in the neighborhood of $250-300 millions), and thus are well positioned to offer a 24-hour service over a channel on the so strongly emerging cable sector.

NBC did decide to offer such a service to the MSOs. But TCI refused to carry it -- and TCI and Time-Warner (then Time-Life) have very close links to CNN, as the Subcommittee knows. At this point, if the 1984 Act were truly effective, NBC would have used the leased channel provision to gain access to TCI, ATC, etc., systems with 36 or more channels and have reached many millions of cable subscribers. But the leased channel provision is a joke, because of all the constraints on its effective use; there is no competing outlet -- MMDS or DBS -- that would be effective; and therefore there is no competing 24-hour news service, although it is a natural effort for one or more of the three major networks. NBC was forced to change its entire focus, and propose to TCI a consumer finance channel (CNBC), and only then was given access to cable.

From the point of view of diversification -- of robust, wide-open debate, that episode is a smoking gun: It shows that as presently structured and regulated, cable, despite its marked contributions to diversity, is a First Amendment horror.

And that is true also in the critical area of the competing local broadcast station. At the time of passage of the 1984 Act, the FCC must carry rules were in effect. Now, as a result of two court tests, cable can operate as it wishes with respect to carriage of local stations. Take a hypothetical case right here in Washington: Suppose the cable system here does not carry the independent station on Channel 50 or the noncommercial station on Channel 32. The operator, making good faith judgments as to what its viewers most desire, does not carry these statons in order to present other programming over its limited number of channels; and after all, the viewers will get the local independents on Channel 5 and 20 and the noncommercial service on Channel 26.

The problem is that stations on Channel 50 or 32 are thus doomed to failure. The cable operator has, in effect, told its subscribers: "I have brought you the really worthwhile, popular local programming." In those circumstances, no subscriber is going to use an A/B switch and put up or maintain an antenna to receive these two stations; the stations are cut off from a substantial number of local TV households, perhaps as much as two-thirds at some point. But it was national policy, embodied in this Congress' enactment of the all-channel law, to promote these stations -- to have them succeed or fail in the TV marketplace, and not because a cable operator, exercising editorial judgment over what should go over its presently limited channels, determines whether the stations flourish or die.

The cable operator does not carry local stations as a public service gesture; it does so because it is good business -- indeed, crucial to cable's success. I strongly believe that Congress should say to the cable industry: "You need not carry any local stations, but if you decide for business reasons to act as a community antenna, you must act fairly as to all the local stations -- you cannot drop Channels 50 or 32 because that is both anti-competitive and against established Congressional policy." That, I submit, would be both sound policy and constitutional.

The final example involves the consumer. Because the FCC botched the "effective competition" standard, the consumer has been left unprotected in situations of inordinate increases in the basic rate like those in Tennessee decribed by Senator Gore. Again this stems from the monopoly nature of cable, from its bottleneck control over the cluster of basic services desired by the consumer.

I should like now to turn to the proposed legislation to revise the 1984 Act. I will focus on the latest version, the Committee Staff Draft of March 9, 1990.

The thrust of this draft is to give the FCC the general guidelines governing possible action in a field -- for example, regulation of rates charged for basic services -- and leave the FCC to work out the specific regulation after appropriate study and proceedings. This approach has been much criticized by elements of the cable industry as wholly inappropriate, drastic and permitting the agency discretion to rum amok.

In my view, no other approach is sound legislation in this dynamic field. It would be a mistake for Congress to try and adopt detailed and specific legislation. The field is changing so rapidly that the legislation would be sure to be outmoded in a few years. Congress should set out the appropriate broad guidelines or policies and leave their implementation and continuing refinment to the agency. In the broadcast multiple ownership field, Congress did not specify the details, and the regulations have been much revised over the years. It should not do sc here when dealing with cable multiple ownership issues, whether of horizontal or vertical concentration.

To take another example, the issue of rates must take into account shifting trends as to cable programming, unbundling of such programming or "mini-bundling", or cable's need to convert to fiber, possibly to meet growing telco competition in the latter part of the decade. The plain fact is that the only legislation that the cable industry naturally seeks is what I would call "11th toe" legislation -- one that lops off some unnecessary 11th toe and affords cable peace and certitude for the rest of the decade. Such legislation will not deal with the very real diversification problems posed by cable's present structure, and legislation that does deal with these problems should adopt the approach of the committee draft, that is, delegation to the FCC with general guidelines or policies set out by the Congress.

I will briefly comment on some of the important areas in the staff draft. First, there is a need to focus on the long-term and the short-term solutions to the diversification problems posed by cable's present dominance of multi-channel broadband (video) distribution into the home. The long term solution is a broadband common carrier operation, one where there is very largely a separation of content and conduit and thus video publishing, akin to what now occurs in print over the postal system. It is thus vital to encourage the telco to proceed in an orderly and evolutionary fashion to provide such a system. It may be sometime early in the next century before it can be fully effective, but if we do not begin and follow through in this decade, we will be bemoaning the broadband structure of 2010.

I therefore fully agree with the clarification in the draft that neither the programmer or the telco needs a local cable franchise. The operation is not a cable TV operation -- that is, one of a video packager that operates a broadband wire system. It is very largely, if not exclusively, a common carrier operation, and one no more needs governmental permission to send matter over such an operation than today there is a need for some permit to render an audiotext service over the telco narrow band facilities. Indeed, it would not be constitutional to impose such a requirement.

The more difficult issue is whether the telco, while required to very largely operate as a common carrier, should be allowed some few channels (e.g., less than five) in which it could have an interest in the programming material (similar to what is allowed today in Washington in audiotext where the telco provides time and weather). The policy reason for allowing this is that the telco faces an entrenched competitor (the cable system), and thus some very limited amount of "pump priming" should be afforded. I believe that this is warranted, and that the legislation should so provide, with appropriate safeguards (e.g., as to the number of channels; use of a separate subsidiary; etc.). It seems to me that the essential goal -- the provision of video services on a common carrier basis -- is still being both preserved and in the circumstances promoted by this limited step.

As to the short term, the solution from the standpoint of the cable programmer lies in making the leased access provision truly effective instead of a dead letter. The staff draft commendably addresses the problem but I believe that it should direct the agency to focus on one method -- in th event of a stalemate as to terms, resort after a specified period to last offer compulsory arbitration, with the programmer given access to the system while the arbitration is going foward. The key is to provide immediate access since any long drawn out process undermines the chances of success of the proposed service. By using the last offer technique, the process most closely emulates the marketplace, and avoids having the FCC regulate the rates or terms, a most difficult matter as experience with the Copyright Royalty Tribumal has shown. And the entire process changes the leverage of the parties; today that leverage rests entirely with the cable entrepreneur.

I suggest that the guideline to the Commission should be along the above lines, with the agency adopting the appropriate regulation as to the period before the arbitration process commences (and also carriage), credit worthiness and financial stability showings required (which would be resolved by the Commission prior to arbitration), etc. It should be kept in mind that the cable industry agreed to the concept of leased channel as a crucial linchpin of the 1984 Act; all that this approach does is to assure that it is effective and in a way most closely emulating the marketplace (rather than governmentally prescribed rates). Further, if this provision proves effective, it may well reduce or eliminate the need to take action as to vertical integration, an area where there have been decided pluses to the public interest through MSO financial support, and carriage, of channels like the Discovery or Black Entertainment channels (and thus there should be no limit on the carriage of such channels, as proposed in the draft).

There is another short term proposal that might afford relief to both the putative cable programmer and the consumer -- namely, to give them an effective alternative to the bottleneck cable system. The staff draft seeks to do this by two provisions -- to require that the video programmer that is owned or controlled by a cable operator not unreasonably refuse to deal with a competing medium like MMDS or DBS, and to specify that no video programmer, with certain caveats, can discriminate in price, terms, or availability of its programming as between cable and the rival media. I suggest that the latter provision be revised to make clear that it applies only to the cable video programmer and to competing media that have no substantial cable ownership interest.

Even if so revised, I regard this as the most controversial proposal. Reasonable exclusivity is both normal and justifiable in the competitive television programming market. Indeed, for years I and others have deplored the way Congress has permitted cable to operate in the last decade -- with a compulsory license and no syndex protection, so that a local broadcaster, which paid much for the exclusive right to show some syndicated series, was unfairly treated. The only justification for the proposed drastic interference with the marketplace is (1) that it is a short term measure needed to spur competition and eliminate the present unhealthy bottleneck situation and (2) it is not unfair to treat the cable industry in this fashion since cable itself has long been the recipient of such interference with the market (and indeed still clings to the need for a compulsory license for distant signals, which can carry considerable sports, etc., programming not subject to syndex protection). At the least, the Committee should ask representatives of the cable industry why they believe cable is entitled to this gross interference but the nascent competing media have no similar claim as to cable's product.

I do recommend that the Committee give the proposal the most serious consideration. I would revise the proposal again to try to emulate the marketplace as much as possible rather than rely on governmental review of rates or terms. I would therefore suggest that the FCC be directed to use last offer arbitration, with the arbitrator also determining disputed matters of credit worthiness, required financial stability showings, etc. Unlike in the case of leased channel access, there would not be access until resolution of all disputed matters by the arbitrator. The FCC would again specify by rule the various time and other parameters of the process.

If the Committee does decide to proceed along these lines, any such interference with the marketplace should be strictly limited; the legislation should carry a specific "sunset" date -- some period of seven years or less -- with the clear admonition that it will not be extended. We have done enough damage to the competitive marketplace with cable: At some point in the near future, the government should stop running this cartel.

There is also the need to deal with the bottleneck situation so that the public interest is served as to the local broadcaster. This requirement does not stem from the existence of the compulsory license for distant broadcast signals, which should be withdrawn in as short a period as possible (or alternatively, the legislation or the FCC could withdraw authorization to import the distant signals). Nor is it based on any unique status of broadcasters as public trustees. With the elimination of the fairness doctrine and the anti-trafficking policies -- with radio and television deregulation and postcard renewal, the public trustee concept is a joke. The requirement should be based solely on the fact that broadcasting competes with cable service for audience -- yet more and more it can reach the audience only through its competitor, cable. It is anti-competitive for cable to let some broadcasters reach that audience and deny it to others; it is unfair for cable to make use of the broadcast medium for its own business purposes and at the same time undermine the efficacy of a significant portion of that medium and thus of the allocation of valuable frequencies by the government. Further, there will inevitably be complaints as to the carriage choices made by the cable operator -- that it failed to carry some local broadcast service because it is competitive with a cable home shopping service or a cable operator's own local "broadcast-type" operation. There is no way the FCC can review such business/programming choices by the bottleneck cable competitor.

As stated, I believe that cable should be given a choice: (1) Leave the broadcast medium alone. Unlike in the case of

Channel 50 and 32 in the above hypothetical situation, the viewer will then really use an A/B switch and antenna to be able to obtain broadcast service; in any event, the broadcast system will continue to operate as before cable, and there is no unfair competition.

(2) Or, if for business reasons, cable does wish to make use of broadcast signals, it must then carry all the full power local signals. If it wishes to gain subscribers by being a master antenna service, it must be such a service for all the local signals. The FCC would by rule reasonably define the criteria to qualify as local (e.g., assigned to the cable community or with a transmitter within 25 miles or having a substantial audience share in non-cable homes). These signals would then be carried on one tier (in ascending order), with no cable programming inserted or carried on that tier; it is unfair for cable to feed off the broadcast system in this manner, and the community antenna aspect of cable would then be priced separately and at the lowest figure (since there is no programming cost). The FCC would also need rulemaking to phase in this system over an appropriate time period and to specify how the transition should be managed, with preferences to noncommercial and independent UHF stations, which are the ones most in need of carriage.

I understand why the staff draft adopts the complex approach of specifying the number of TV signals by relating it to the number of cable channels. That approach largely reflects the industry compromise. But it glosses over the essential public interest reason for carriage; it leaves the Channel 50's and 32's at the mercy of the cable operator when they are the stations most in need of carriage; and it leaves the entire area subject to serious court challenge. The approach advocated here, if implemented in a orderly fashion, is sound policy and sound law. Indeed, if the cable industry cannot follow an approach which is so manifestly fair and called for, it is really saying that it does not have the capacity to do the job. If that is the message of the present cable operators, it is an open invitation to entry by others who will provide the needed capacity -- including the telcos.

In the vexing area of the price charged for basic service, I agree that the matter should be left to the FCC. I suggest that the guideline ought to be a price cap related largely to the CPI for a limited period -- say, three years -- and then a report by the FCC and GAO of industry trends. There is a great need for proceeding conservatively by permitting considerable flexibility on the part of the industry and any regulator. The industry may well have to respond to expansion plans, particularly if proposals like mine on must carry were adopted or if telco began its own fiber optic conversion. Equally important, the industry may well change to a significant extent its tiering or offering techniques, thus also changing any regulatory regime. The issue, after all, is whether the consumer has competitive choice. In the case of premium services like the movie channels, these have always been soundly unregulated, since there is choice -- the

VCR, the bargain theaters, etc. Some cable operators talk of further unbundling either as to specific services or mini-tiers; and this in turn will raise the issue whether there is a need for any regulatory price oversight of these services. The industry clearly should have discretion to try out various marketing approaches.

Finally, I address two omissions in the staff draft. First, it does not deal with the error of the 1984 Act in reversing the FCC policy that the franchise fee must be used for cable-related purposes instead of simply disappearing, as now, into the local government's pockets. That franchise fee is a tax on cable subscribers, since it is passed on to them, and it should be used for their benefit. Indeed, unless so used, it is simply another revenue tax and one that singles out a First Amendment speaker, contrary to Supreme Court decisions. I strongly urge you to consider again the sound proposal advanced by Senator (then Chairman) Wirth in 1984. I know no legislative step that would more greatly serve the public interest in this field. While I am aware that the cities will oppose this, they are in the wrong.

The second omission deals with franchise renewal. The staff draft leaves the 1984 scheme intact, with the sound exception of substituting a standard of "substantial evidence" for the present specification of "preponderance of evidence." But the process should be amended to give local groups or individuals standing to participate in the administrative proceedings and to seek review in the courts. That right is available as to all eight TV and 42 radio stations in Washington, but when the important cable medium comes up for refranchising every 15 years, the public has no similar right. Local governments can err just as much as the FCC. The FCC now relies very largely on the public to bring matters of inadequate operation to its attention, and the statutory provisions as to the right to petition or to appeal at least give some weight to this reliance. In the cable field, there is a void in this important respect. The message is thus that the public is not really wanted in the process.

I understand that First Amendment considerations are important to you in your study of possible revisions. I have set out in an appendix to this Statement my brief treatment of this area. I hope that it is helpful to you and would be glad to develop further any aspect that might be of interest.

Thank you for this opportunity to address some of the issues in this most important field.

HENRY GELLER

Communications Fellow, The Markle Foundation
1776 K STREET, N.W., SUITE 300
WASHINGTON, D.C. 20006

(202)429-7360
FAX (202)429-7049

April 16, 1990

Ms. Gina Keeney
Minority Counsel
Committee on Commerce, Science
and Transportation
United States Senate
Washington, D.C. 21510-6125

Dear Ms. Keeney:

This is in response to your letter of April 4, 1990, requesting answers to three questions of Senator Gorton. I regret the delay in responding but I was away on vacation until today. I h[illegible] that this letter arrives by the April 17th date.

1. I strongly agree that the Congress, and the FCC and State regulatory agencies, should adopt approaches promoting investment in the nation's telecommunications infrastructure, and specifically a broadband (fiber optic) "highway" into the home, provided on a very largely common carrier basis by the telcos. I regard this as the best long term solution to our present dilemma, and believe that if we do not now fashion policies promoting the orderly development of that broadband common carrier infrastructure, we will be bemoaning this failure in 2010. As for the policies that are called for if we are to evolve to video publishing over a common carrier, I refer to my Statement of March 29, 1990, at pp. 7-8.

2. First, it is not an improper cross subsidization for the the gradual installment of fiber optic cable to be part of the rate base of the telco. The residential user will gain greatly from the provision of this broadband common carrier installation. Indeed, aside from the economic benefits, it is crucial to the First Amendment considerations upon which this country rests, for the reasons set out in my Statement.

Second, the provision by the telcos of content video programming may well be crucial to the promotion of this broadband common carrier highway (the so-called "priming the pump" aspect). In my opinion, such provision should be limited in nature (e.g., to five channels or so) and should be effected through use of a separate subsidiary. This assures that the "content" subsidiary will take service from the parent "in the open" and on the same terms as its competitors (with regulations dealing with the flow of network information or subscriber data). And it causes no inefficiency because there cannot be any claim that there are economies of scope or scale or other reasons to integrate such a content operation into the parent transmission service. In my opinion, therefore, there is no need to work out details of CEI (comparably efficient interconnection) or ONA. The content service could go forward now on the basis of the separate subsidiary.

3. I believe that the main reason for promoting the broadband common carrier highway is set out above and in my Statement (i.e., the great First Amendment benefits from video publishing over such a carrier). But I agree that with the widespread existence of this network, there will undoubtedly be other substantial benefits to the quality of life in the information age in areas such as health and education, both in urban and rural environments. Indeed, it is not possible now to envision all the potential uses of a broadband common carrier highway.

I hope that the foregoing responses are helpful to the Committee in its consideration of this most important matter.

Sincerely yours,

Henry Geller

Henry Geller

Senator **Inouye**. Mr. Hipple.

STATEMENT OF JOSEPH W. HIPPLE III, CHIEF OPERATING OFFICER, PEOPLE'S CHOICE T.V., RANTOUL, IL

Mr. **Hipple**. Thank you, Mr. Chairman. I truly appreciate the time that you have extended to us during these hearings.

My name is Joseph Hipple, and I am appearing today on behalf of PacWest Cable Television, which I will refer to as PacWest. It is a joint venture that operates a combined wire and wireless cable system in Sacramento, California.

Our company is one of those which uses new wireless technology to compete with the traditional cable company in our market owned by Scripps Howard.

We have previously filed written testimony, but I would like to briefly emphasize from the standpoint of a multi-channel competitor of a powerful cable company the importance of that part of the draft bill which strives to assure fair access to programmers for entities such as ours.

I should also note that I am the Chief Operating Officer of one of the partners in PacWest, People's Choice T.V., which is currently implementing plans for wireless cable systems throughout the country. And I might add that we are the owner or leaseholder of a significant number of wireless channels that will provide a full-fledged competitive environment to conventional cable television.

So while some of my remarks today may be specific to Sacramento, the significance of that situation and the importance of the bill's provisions apply to the developing wireless cable industry in general.

First, I would like to stress what may seem obvious, that our most critical need in competing with cable companies is programming. Start-up funding for wireless systems is available if the competitive ground rules are reasonable.

The technology for the wireless delivery of excellent quality, secure signals to customers is already in hand. The expertise for marketing on cable multi-channel services in a competitive environment is readily available. And we are dedicated to providing customers a quality program product with excellence at a fair and reasonable price.

But without programming competitive with cable company offerings, none of that makes a difference. A wireless company without, say, HBO, ESPN or TNT simply cannot survive against a cable company that has all three, and the draft bill recognizes that reality by assuring an ability by wireless cable operators to deal with program suppliers.

Now, we have heard from cable MSOs and others throughout the hearings throughout the last several weeks and hear today, however, that a legislative access requirement is not needed, that programming is already readily available to wireless operators.

I am here to tell you that that just is not so and to tell you about our recent experience which proves it is not.

As I detailed in our written presentation, our Sacramento system uses both wire and wireless delivery system. We are only five months old, but we have got about 3,000 customers and we are adding 45 to 50 customers a day, and we think we will have about 12,000 customers by the beginning of next year.

We are providing our wireless customers 24 channels of programming now, 18 of which are by satellite, and we plan to be up to 26 channels by year's end.

Within the past month, however, Turner Broadcasting System, now controlled by the major MSOs, has told us they are going to withdraw their premium service from us because we use wireless technology to deliver it to our customers. That service is called TNT, Turner Network Television. It carries movies, original programming, National Basketball Association games and will include Turner's National Football League presentations.

We have carried the TNT programming since November. It is the third most popular among our customers, and we have been paying Turner on time for each and every one of our customers.

I want to dispel any misapprehension that this is just a contract dispute between Turner and us. In fact, it is a matter of Turner policy by extension, controlling MSO philosophy.

Turner's termination letter to us, which I have attached in my testimony, my written testimony, made it clear, and I quote, "The TNT service is not and has never been available for wireless cable distribution." I would like to just repeat that. "The TNT service is not and has never been available for wireless cable distribution."

Turner said the same thing to the FCC as recently as the 1st of March, and I quote, "Only cable systems and Turner are eligible to be distributors of TNT. TNT is not offered to wireless cable systems."

Other than to undercut our ability to compete, it is hard to discern Turner's reason for such an approach. From a commercial standpoint it does not make too much sense. We increased TNT's audience and revenues.

In its March 1st filing with the FCC, Turner's basic rationale was that a no-wireless policy was a result of exclusivity arrangements granted to cable companies who initially agreed to carry TNT for a three-year period. But even if that is true, it has nothing to do with our situation in Sacramento because Scripps does not have an exclusive for TNT in Sacramento to protect. In 1988 Turner signed affiliation agreements with both Scripps and PacWest.

In sum, we believe our situation flatly contradicts MSO assurances that wireless cable operators now have ready access to programming, and we particularly believe the draft bill provisions safeguarding wireless cable in other non-cable access to program sources are necessary if a fair environment for wireless cable competition is likely.

We congratulate the committee on a balanced and foresighted measure. We feel it would ensure a healthy cable industry while promoting competition on a more level playing field.

We also believe the American consumer will be the ultimate beneficiary both in terms of cost efficiencies and innovation in programming driven by a broader customer base.

We stand ready to help, Mr. Chairman, in any way we can. Thank you for much for this time.

[The statement follows:]

TESTIMONY OF

JOSEPH W. HIPPLE III

CHAIRMAN, VENTURERS COMMITTEE

PACIFIC WEST CABLE TELEVISION

My name is Joseph Hipple, and I'm appearing today for Pacific West Cable Television ("PacWest Cable"), a joint venture which operates a combined wire and wireless cable system in Sacramento, California. I'd like also to note that I'm Chief Operating Officer of PCTV Partners, one of the two joint venturers in Sacramento, which is currently involved in the planning, financing and deployment of wireless cable systems in a large number of major markets throughout the country. I appreciate the opportunity to appear before the Committee today.

At the outset, I'd like to state our strong support for the Draft Bill. In areas which directly affect us as wireless technology users, we particularly concur with the Draft Bill's findings that there is a strong public interest in promoting a diversity of views through multiple technology media, and that MSO-controlled program suppliers have the incentive and ability to favor their affiliated cable operations over programming distribution using other technologies.

We particularly support proposed Section 640 in the Draft Bill, which seeks to assure nondiscriminatory access by wireless cable and other multichannel distributors to video programmers whose product is available to local cable operators. At the same time, we believe certain minor clarifications of the Draft Bill's wording in that regard should be made; those clarifications are reflected in the attached Comments on the Draft Bill by the Wireless Cable Association (Attachment 1 hereto), which we support.

From the standpoint of a wireless cable competitor in the marketplace, I cannot stress too strongly that our competitive survival depends directly on nondiscriminatory access to the same program services as our cable competitors. A 30-channel wireless system without, say HBO, ESPN and TNT, simply cannot hold its own against a cable incumbent with all three. The Draft Bill addresses the problem directly, and correctly, in assuring at least a fair opportunity for non-cable companies to access needed programming.

During recent months, there has been substantial discussion -- in Congress and at the Federal Communications Commission -- on the extent to which MSO control of video program services has been used to inhibit the development of wireless cable systems. The MSOs have offered repeated assurances that wireless cable operators have not been denied access to programming by MSO-controlled programmers, and that, consequently, there is no practical cause for concern -- much less for legislation or regulations.

However, our own experience in just the past few weeks flatly contradicts the MSOs' assurances, and dramatically illustrates the anticompetitive hurdles wireless cable operators face in gaining access to MSO-controlled program services. Fundamentally, a major MSO-controlled program supplier has advised us it is withdrawing a program service we use and depend on, because we use wireless cable facilities; that same supplier has also refused to consider negotiating our current affiliation agreement to permit wireless distribution in the future. To the extent they fully support the need for the nondiscriminatory access provisions of the Draft Bill, I'd like to recount the facts of our situation for the Committee's edification.

The Sacramento Cable Market

Scripps-Howard, through a 95%-owned venture, Sacramento Cable Television, was awarded a franchise to provide cable service to the City and County of Sacramento in 1983. Sacramento Cable currently serves approximately 170,000 subscribers in the Sacramento area. Scripps-Howard is among the 20 largest cable multiple system owners ("MSOs") in the United States, holding some 100 cable system franchises, and serving some 540,000 subscribers.

In August, 1983, two private entrepreneurs -- Joseph Benvenuti and Bruce Fite -- formed Pacific West Cable Company ("PacWest") to obtain a cable television franchise to compete with Scripps. Faced with inordinate entry requirements demanded by the Sacramento Metropolitan Cable Commission, PacWest was relegated to protracted civil litigation to obtain its franchise. In August, 1987, after a full jury trial, a

United States District Court directed the issuance of an authorization to permit PacWest to build and operate a second cable system in Sacramento. Pacific West Cable Company v. City of Sacramento, 672 F.Supp. 1322 (E.D. Calif. 1987).

During late 1987, when PacWest had commenced the construction of the system's transmission facilities, Scripps sought and obtained a modification of the local ordinances, and its own franchise agreement. The prior requirement for nondiscriminatorv pricing was eliminated, enabling Scripps to lower its rates (in some instances, give away free service) in areas where it faced potential competition from Pacwest, while raising rates in areas where PacWest was not constructing facilities. Because such practices were blatantly anticompetitive, and directly threatened its competitive survival, PacWest filed a predatory pricing suit against Scripps and the City and County. While the litigation against the City and County was settled in December, 1989, the suit against Scripps is pending.

During 1988, another entity was also considering the institution of a second multichannel video distribution service in Sacramento. PCTV Partners (a partnership of Graphic Scanning Corp., Omni Microwave Television and Specchio Developers, Inc.), through a subsidiary, People's Choice TV of Sacramento, Inc., was aggregating (through ownership or lease) rights to use as many as 33 frequencies (MDS, MMDS, OFS and

ITFS) in Sacramento for a wireless cable system competitive with Scripps' service. Following lengthy negotiations begun in fall of 1988, PacWest and PCTV Partners agreed to form a joint venture -- PacWest Cable. PacWest Cable would combine PacWest's traditional "hard wire" cable technology with PCTV Partners state-of-the-art "wireless" video transmission capabilities into a single, fully integrated video delivery system. (See Attachment 2.) Because of the lesser capital costs for the wireless facilities, it was hoped that system-wide services could be offered at lower prices; it was also hoped that off-the-air service throughout Sacramento might offset the effect of Scripps' discriminatory pricing on PacWest Cable's wire service offerings.

In the near term, there were practical advantages to PacWest Cable's dual-delivery capability. Instead of being able only to serve customers where cable had been deployed, PacWest Cable's over-the-air facilities could be used immediately to extend service to major portions of Sacramento. With a broader customer base and revenue stream, continued deployment of the wire facilities would proceed on a more sensible economic basis. Longer term, such an approach was consistent with the ultimate intent to provide different tiers of service throughout Sacramento, utilizing either wire or wireless delivery capabilities (or both), where each was most technically and economically advantageous.

The combined service was "kicked-off" in November of 1989. As of April 1, 1990, some 150 miles of cable will have been deployed, and 18 over-the-air channels will be offered. Approximately twenty-seven hundred subscribers are currently being served, and are being added at a rate of 45 to 50 per day; more than half are first-time subscribers to multichannel video services. By year's end, PacWest Cable plans to have 26 over-the-air channels operational and additional channels available to subscribers served by wire; subscribers are projected to be in excess of 12,000 by January, 1991. Current investment in equipment and operations of some $10 million is expected to double by the end of 1990.

Community reaction to PacWest Cable's new entry and services is reflected in its sharp subscriber growth. Cost is undoubtedly one factor, witness the following comparison of PacWest Cable's over-the-air lineup with Scripps' package:

	Basic Service	Basic Plus 1[1]	Basic Plus 2[2]
PacWest Cable	$13.95	$19.95	$25.95
Scripps	$22.00	$29.00	$34.00

But in practical terms, PacWest Cable's ultimate success will depend on its program offerings.

---

[1] Basic Service plus either HBO or the Disney Channel.

[2] Basic Service plus HBO and the Disney Channel.

At present, PacWest Cable provides its subscribers the following satellite program services over its wireless facilities: CNN, USA, Lifetime, Nickelodeon, Arts & Entertainment, VH-1, the Discovery Channel, TNT, ESPN, Sacramento Kings Sports Network, Home Box Office, MTV, the Disney Channel and several pay-per-view channels.[3/] The continued availability of satellite programming -- particularly such services as ESPN and TNT -- is the lifeblood of PacWest Cable's competitive venture.

Our Competition Has Already Benefitted Sacramento Consumers

PacWest Cable's recent entrance in the Sacramento market has already yielded discernable benefits for residents of Sacramento. In addition to making multichannel services available at lower rates where Scripps already provides its service, PacWest Cable's wireless technology has made multichannel service available to areas of Sacramento where Scripps has not yet extended its service. Indeed, in that regard, Scripps' failure to provide promised service to portions of the City and County has been a major community

---

[3/] Also carried are the following local broadcast stations: KCRA (Channel 3, NBC), KVIE (Channel 6, PBS), KXTV (Channel 10, CBS), KOVR (Channel 13, ABC), KRBK (Channel 31, Independent) and KTXL (Channel 40, Fox). Additional satellite and broadcast services are available to PacWest Cable's wire subscribers.

problem.[4] Now, however, residents have an alternative. As recently reported in the Sacramento Bee:

> David Laughtin said a Sacramento Cable representative told him last April that service would be turned on within six months after he moved into his new home on Yermo Way in January 1989. By Thursday, none of 30 occupied homes in the new subdivision near Power Inn and Calvine roads had been hooked up.
>
> Laughtin said monthly telephone calls to construction staff at Sacramento Cable produced repeated explanations of equipment problems, promises that service would be turned on soon -- and busy signals. "It was always a different reason," he said. "It was a runaround."
>
> Next Wednesday, Laughtin is expecting a visit from cable TV installers -- from Pacific West Cable Co., Sacramento Cable's chief competitor.[5]

---

[4] Scripps was to have completed construction and made service available to all of the homes in its service area by March 23, 1989. Having failed to meet that deadline, the company requested and obtained an extension until September, 1989 to complete construction. The extension expired, and the company subsequently promised to complete construction by December 31, 1989. As of March 1, 1990, construction was still not completed and the Cable Commission initiated an enforcement proceeding and considered imposing fines of $1000 per day.

[5] Davila, "Cable: A day late, a day free," Sacramento Bee (March 14, 1990) at B1, B2, col. 2; see Natt, "Cable TV company is getting static from many customers," Sacramento Bee (September 6, 1988) at A1, col. 1. As this story illustrates, one of the many ways in which wireless cable systems surpass traditional cable systems is their ability to deploy their service more quickly to subscribers. See Letter from Carole D. Fisher to Richard [illegible]. Esposto, Executive Director, Sacramento Metropolitan Cable Television Commission (February 2, 1990).

PacWest Cable has also provided an alternative to -- and, equally likely, a competitive spur to improve -- Scripps' notoriously poor customer service. As noted by the Sacramento Cable Television Commission:

> Customer Service, especially telephone service, continues to be a problem at [Scripps]. Recent telephone surveys by staff have averaged seven minutes of hold time, with some waits as long as 15 minutes. Over 30% of the callers to the Commission voluntarily complained about poor telephone service. Subscribers or potential subscribers also complain about being unable to resolve problems with [Scripps] after several attempts.
>
> In looking ahead, customer service improvements are likely as competition increases from Pacific West.

A Sacramento Union story was somewhat more pointed:

> Try calling Pacific West . . . as a potential subscriber. You'll likely get an answer -- a real live body, that is -- by the third or fourth ring. Now do the same at Sacramento Cable . . . . The chances are even greater you'll be put through a couple touch-tone-phone hoops, then hear some taped cable-TV news spiel before reaching an operator 3-5 minutes later.[6]

In these and other ways, PacWest Cable's presence has already yielded demonstrable benefits for Sacramento consumers. The community and local regulators are supportive and appreciative.[7]

---

[6] "Local cable war -- 'price' vs. 'package,'" The Sacramento Union (January 18, 1990) at 70, col. 1 (Attachment F hereto).

TBS's Withdrawal of TNT Service

Turner Broadcasting System ("TBS") offers various program services to cable operators. By virtue of its financial realignment during 1987, control of TBS was assumed by a consortium of major MSOs, including ATC, Time/Warner, TCI, United Cable, United Artists, Continental Cable and Comcast.

TBS wholly owns Turner Network Television, Inc. ("TNT"). That service -- which TBS sees to be its premium offering -- currently includes movies and NBA games, and will add TBS's recently acquired NFL presentations.[8] It is an

---

[7] As the Sacramento Business Journal reported, "The thought of competition for pay TV gladdens commission executive director Rich Esposto. 'This office is on record as being supportive of competition.'" Larson, "Benvenuti's TV firm chases Sac Cable," The Business Journal (December 18, 1989) at 1, 43, col. 3.

[8] Perhaps the most recent example of the MSO's influence over TBS and TNT activities started on March 8, 1990, with a report that TCI Executive Vice President J.C. Sparkman had said (among other related things) "that TCI is urging Turner Broadcasting to move NFL coverage to TNT." Communications Daily, March 8, 1990, p. 3. One week later, the following was reported:

> Turner Broadcasting will move its NFL coverage to TNT from originally planned WTBS, according to joint announcement. Turner Entertainment Networks Pres. Gerry Hogan said change is "in the best

(Footnote Continued On Next Page)

important service, and the third most popular carried by PacWest Cable.

In 1988, TBS agreed to make the TNT service available to PacWest. PacWest has delivered the TNT signal -- both over its wire facilities and, by extension, through PacWest Cable's over-the-air facilities -- to its subscribers throughout Sacramento. PacWest Cable has honored all of TNT's requirements, and has paid TNT for each of its subscribers -- whether reached by wire or over-the-air -- at the contract rate.

In January of this year, however, TNT wrote PacWest, essentially claiming that it had not intended that TNT would be delivered to subscribers other than by wire, and that unless PacWest Cable ceased delivery of TNT to subscribers through over-the-air facilities, TNT would terminate its agreement with PacWest. PacWest Cable responded, explaining the interrelationship between the wire and wireless delivery components of PacWest Cable's system, and made clear that its over-the-air delivery of TNT in parts of Sacramento was an integral part of the allowances in the PacWest/TNT agreement. At the same time, PacWest Cable made clear that, if the over-the-air delivery

---

8/ (Continued From Previous Page)

> interests of all concerned" and guarantees that both sides will get "maximum benefit" from programming.

Communications Daily, March 15, 1990, p. 7.

portion of its operation presented new considerations for TNT, PacWest Cable was prepared to renegotiate the TNT agreement to take such matters into account.

TNT's reaction was summary and adamant. By letter of counsel dated March 6, 1990 (Attachment 3) -- following a meeting between the parties -- TNT advised PacWest Cable that it would terminate the TNT service after March 31 unless delivery of the signal through the over-the-air facilities was terminated. While the letter couched TNT's reasons in contrived contract terms -- matters PacWest Cable will address in the forum appropriate to such issues -- the basic message was unequivocal:

> The [TNT] Service is not and has never been available for [wireless cable] distribution. TNT would not have entered into the [1988 Affiliation] Agreement if it had known Pacific West intended to distribute the Service via [wireless technology].

And TBS refused to even consider renegotiating its agreement with PacWest Cable, to take its wireless facility distribution into account, or to permit it in the future.

I'd like to emphasize that there are no questions about the security or quality of the TNT signal delivery by PacWest Cable; indeed, TBS has agreed to PacWest Cable's carriage of CNN, another TBS service, over the PacWest Cable system. And the existence of TNT's longstanding agreement with PacWest belies any serious claim that Scripps was given a prior exclusive use of the TNT service in Sacramento; both Scripps and PacWest Cable were given TNT carriage rights in 1988.

Instead, TBS's position, pure and simple, is: We don't -- and won't -- deal with non-cable companies for the carriage of TNT service. Moreover, that position is not limited to our Sacramento situation -- it's a matter of general company policy. In a filing with the FCC on March 1 of this year, TBS stated unequivocally (see Attachment 4):

> Only cable systems and TBS are eligible to be distributors of TNT . . . . TNT is not offered to [wireless cable] systems . . . .

Conclusion

The withdrawal of TNT service from PacWest Cable is in stark contrast to what the MSOs repeatedly claim in public -- that they do not deny wireless cable enterprises access to their controlled program suppliers. Not only has TBS here declared that its service "is not and never has been available" to non-wire distribution systems, it seeks to assure it never will be -- both by refusing even to consider such an arrangement with PacWest Cable in the future, and by terminating service even to a wire system which also employs over-the-air distribution components.

Such arrogant and anticompetitive conduct is dramatic confirmation of the need for the Draft Bill's requirements of open and nondiscriminatory access to program suppliers. For our situation demonstrates that, whatever their public rhetoric, the MSOs will not voluntarily permit such access to wireless cable enterprises such as ours. And without such access, the Draft Bill's ultimate objective -- to promote, for the consumer's benefit, fair and viable competition in the multichannel video distribution market -- cannot be achieved.

Senator INOUYE. Thank you very much, Mr. Hipple.

Senator Danforth.

Senator DANFORTH. Mr. Chairman, thank you very much.

Mr. Garner, you were good enough to come here from what was once my home town, Jefferson City, to tell us a horror story. The Chairman was out of the hearing room when you did it.

I would like you to just review for us, if you would, what the facts were.

As I understand it, the Jefferson City City Council awarded a cable franchise to a company called Central Telecommunications in April of 1982. The Mayor vetoed that decision, and TCI was awarded the franchise and then Central Telecommunications sued TCI and won a judgment of $35 million.

Mr. GARNER. That is correct.

Senator DANFORTH. Now, can you tell us what was the substance of that case? It was a jury trial?

Mr. GARNER. It was a jury trial.

Senator DANFORTH. What did the jury believe?

Mr. GARNER. The jury believed—and I guess as short and sweet as you can make it that TCI used every tool, including some outside the law, in order to protect its franchise interest in Jefferson City.

Senator DANFORTH. TCI had the franchise and then the City Council awarded it to a competitor, right?

Mr. GARNER. Well, the council voted to award it to a competitor. The Mayor vetoed that award. The council then on a tie vote would have awarded it to TCI. The Mayor cast the deciding vote and awarded it to TCI.

Again, that was done after a number of events on the part of TCI, including publishing the numbers of the elected officials, the phone numbers of the elected officials in the paper directing citizens as much as possible to focus on that.

Senator DANFORTH. I do not want to interrupt you, but this is exactly what I would like you to do: To tell us what TCI did that led to a judgment of $35 million against TCI. What practices did it engage in to get this contract?

Mr. GARNER. The specific practices to try to enumerate them: One, they made direct threats to a consultant hired by the city. These were in the form of stuff you hear in grade B movies about "I know where you work. I know where you live. I know where your wife works. I know where your kids go to school."

Senator DANFORTH. These are phone calls?

Mr. GARNER. A lot of these were delivered in person.

Senator INOUYE. Are these documented?

Mr. GARNER. This is the basis of part of the award that was eventually made.

Senator INOUYE. You have got thugs around there.

Mr. GARNER. Most of those people no longer will work for TCI. I mean, if you go back and check, of course, all these players were removed then.

Senator DANFORTH. Who were these threats made to, Mr. Garner?

Mr. GARNER. Those specific threats were directed at a consultant, an independent contractor the city had hired to assist the city in evaluating the proposals and the options before the city. There were also direct threats to him about putting him out of business. That is one group of threats, so to speak. The rest of the behavior was focused on the City Council to a large extent.

The threats to pull the plug on the cable system again was another large one, to arouse the population again with the ads or the phone numbers to direct that outrage at the City Council by saying if we do not get it, you will not have it for at least a year because on our way out we will make sure it does not work, and the new people will not just come in and use our cables. We will make sure they have to put up their own.

So, there are also a number of documented events where TCI attempted to influence in private meetings and in other methods the council and the Mayor knowing that they would have to eventually vote on any award of a franchise.

The jury's conclusion was that both the antitrust laws had been violated on every count that was presented and also that tortious interference with the business relationship had occurred. They found for Central damages of I believe it was $10,800,000 on each of the antitrust counts, $10,800,000 on the tortious interference and a $25 million punitive damage award. That award did stand up on appeal.

It was appealed and that is part of the cost. The city was brought back into the case because TCI even though we had settled kept bringing the city back in through the appellate process, and we went through the appellate process twice after we had already settled with the company because TCI wanted us to help pay for their mistake.

Senator DANFORTH. TCI now has the contract?

Mr. GARNER. Yes.

Senator DANFORTH. And would you just briefly review the quality of the service and what has happened to the rates. I know this is somewhat repetitious, but I just want to be absolutely clear as to what the city charges relating to TCI. Several months ago I met one day with the City Council. To say the least, it was an attitude of righteous indignation. Could you describe how the service has gone?

Mr. GARNER. The service when we started the renewal process under the 1984 act, at that time we had almost zero compliance in terms of service. There was cable that was supposed to be hanging either on poles or buried underground was laying across the ground. It was across driveways, it was across backyards, it was across property where there was neither right-of-way, which we would have granted them the right to be on through a franchise, nor was it on a dedicated easement belonging to anybody. They had simply put it where they wanted to put it in the method that they wanted to put it.

There were outages. There were a tremendous number of billing complaints. You could not get a simple correction made in the local office. It was always some other state that you had to contact and, of course, they were unreachable. You could not call your local company.

Senator DANFORTH. Do you mean you could not get them on the phone?

Mr. GARNER. You could dial and listen to a busy signal and if you did finally get through, usually you could only talk to, I will not call them temporary employees, but turnover was high and you usually could not get past the people who answered the phone to somebody who actually handled any business decisions.

Most business decisions were not at least described as being made locally. They were made for the most part in Denver or at some other level than the local manager.

When we went through the renewal, we obviously were not real interested in TCI gaining the franchise again. One of the problems we experienced with the 1984 act was that the process was too long by the time we started it and started to document these, there was a fairly instant reaction, again by TCI, in the face of the possibility of losing the franchise.

They then began to do what they should have done years earlier. They upgraded the system to the capacity promised six years earlier. They began to bury some of the cable, although we still get complaints today about unburied cable.

Senator DANFORTH. What has happened to rates?

Mr. GARNER. Rates. The last increase was announced two days ago, and again I previously said that in the last three and a half years we have had 186 percent increase. In the last one that is now going to go into effect May 1st represents a 25.6 percent increase to some customers.

What they did was they announced a $2 rate increase, a $2 charge on converter boxes which had been located in homes for three to five years and included in the basic rate. And now you will pay an additional $2 for that.

And so you get a $4 increase on the current rates which is $16.95, plus there is an entertainment magazine which had been included in basic, and they will now charge 50 cents for that.

We have already gotten a number of calls from people saying well, if it is worth 50 cents a month and I was supposed to have been getting it for the last two years, it never showed up. I want a rebate.

If you add all of those together, this is how you come up with the 25.6 percent and the overall 186 percent in three and a half years.

Senator DANFORTH. What can the City of Jefferson City do about this?

Mr. GARNER. I will be asked that question again next Monday night by the city council. Unfortunately, the answer under the current state of the law is very little.

Senator DANFORTH. Now, let me ask you this question, Mr. Garner. Do you live in Jefferson City?

Mr. GARNER. Yes, I do.

Senator DANFORTH. Now, the position of the cable companies, as I understand it, is that really the public does not complain much and furthermore there are all kinds of other things that people can do other than watch television. This is not—as Mr. Hostetter said, this is not a necessary service. People do not have to watch TV. They can play gin rummy, or read a magazine, so what is the big deal? So everybody should be happy.

Do you have any response to that, as far as Jefferson City is concerned? I mean, here is a community that is about as close to the center of this country as you can get. It is basic mid-America, and we have been told that—where is the beef? There are all kinds of other things people could be doing, and this is not a necessary item.

Is that your view of the mood in Jefferson City? Is Jefferson City a community of people who are docile and relaxed about this, or is there some degree of concern? Are people picking up their copy of "Time" or "Newsweek" or a book, or looking at their aquarium, or is there a feeling that maybe television is something that people want and they are willing to pay for it, even if the cable company has their hooks in them?

Mr. GARNER. I guess there are a number of things I would reply to that. The fastest thing we could do locally to fill up a hearing room is to announce a hearing on cable television. We get a tremendous number of people who express interest. We continue to get a tremendous number of complaints.

While from the technical definition of "necessity" maybe it is not a necessity, the problem is that there is not an equal equivalent in the market, that the terrain in Jefferson City, as in many places in the country, is such that without the community antenna, which was the original purpose of cable television, your reception will be poor.

It meets the current FCC definition of competition. If you look on a flat map and the little concentric circles they like to draw for Grade B signals, we are within the Grade B signals for four different off-air stations. If you live in Jefferson City and plug in your television set and just put the rabbit ears on it, you will do good to get two, and even then, with the exception of the one that is just right outside of town, you may get fuzzy reception on the second one. So in terms of a choice, there is no choice.

I think this is also reflected by, in spite of increases in rates, while there will often be a slight fall-off right after the rate increase, the market penetration is in the 70 percent plus range in Jefferson City, and again this is not the only place in the country where terrain causes them to have a greater piece of the pie.

One other thing that maybe we are aware of, we have heard a number of—I will not call them "pie in the sky," but there is nothing up in the sky right now beaming down 108 channels, or 27 channels. There is no pole capacity to string a second wire. There are regulations in place in many states that dictate how close wires can be on the pole. Our poles are full. The last cable franchise got the last space, so there will only be one hanging on a pole.

From that standpoint, people will pay, just as in other monopolies, whatever the person who owns the monopoly wants them to pay if they want the service, and the people clearly want the service and in terms of real competition, it is not present.

Senator DANFORTH. Mr. Garner, thank you very much, and thank you very much for coming to Washington. Mr. Chairman, thank you.

Senator INOUYE. Senator Burns.

Senator BURNS. One Missourian to another: why in the world would you want to—your city council, or whatever—why would you want to go through this business of franchising?

Mr. GARNER. Again, first off——

Senator **Burns**. Knowing what we now know and what you have been through.

Mr. **Garner**. Well, that was one of the things I put in my written testimony. Given our experience, I think many logical people would have thought we would have been running the other way. The bottom line is, local government serves local people, and tries to respond to their needs and their wishes. Secondly, franchises have been kind of bandied about, and I think one thing to keep in mind is a franchise is a grant of the right to use public property, which in this case belongs to the cities. Without our right of way, they do not get to the houses. If they had to go out and acquire right of way and buy easements, which occasionally they do have to buy small ones, then their cost to do business would be greatly changed.

So whether we like it or not, they are using our property to get to these customers. We feel, therefore, they have an obligation to try to make sure the customers are getting what they deserve. In the scheme of cable television, we see a void in that area if you take local government out.

Senator **Burns**. If the service and installation is, as you explain it, less than desirable, your hearings, you say you can fill up a hearing room pretty quick, I suppose, if you run your ad in the local paper—and you beat up on Hickman High all the time, and I know you guys down there.

I just do not understand. Does TCI respond to that, then?

Mr. **Garner**. Yes. At that point, that is when we found them to finally respond, was when we were going through the franchising process, is when we finally started to get the cable put where the cable belonged, when we finally got installations done in a timely manner.

Just as an example of that, the system at one point was they would take the orders to install. They put them in a box. When a new one came, they put it in front of the box. They did not take the ones off the back to hand out to the servicemen, they always took the ones from the front, so the old ones got older and older and a percentage of the new ones got done and the rest of them began the aging process. That was the system.

Again, I do not really believe a Federal agency wants to get involved in that kind of detail of service to customers in a given town. One of the prior panelists, who from the reception appears to run a slightly different type of cable operation, probably does not generate the great outcry to want to get into some of the service problems, but we have experienced about every kind of service problem there is, and we find only when we have some form of leverage do we get something done.

Senator **Burns**. Well, you are talking to an old county commissioner, and so you know where I come from.

Mr. Geller, you indicated in your testimony that you would favor Telco entry into video programming business. However, you also suggested a limitation on Telco programming capacity. What other safeguards would you suggest that we implement to allow Telco entry?

Mr. **Geller**. I think you should use a fully-separated sub so that there is not any improper cross-subsidization. There is no need to put the content part of the operation that we are talking about in the network. It is totally distinct and different and therefore I would say to the telco that, it has to use a separate sub to do it. That takes care of any question of cross-subsidization of that nature.

I think that it is important to allow telco to prime the pump, and I do not see how any harm would come from that. Here in Washington, C&P in its audiotext operation does time and weather and depends upon everybody else to supply the great bulk of material. I think you could do something comparable in the telco video field by saying that it could have a limited amount of content because it was up against such a stacked deck.

Senator BURNS. Mr. Hipple, did you want to respond to that? Did I see a little sparkle in your eye, there?

Mr. HIPPLE. Regarding the Telco entry?

Senator BURNS. Well, I will tell you what. If I were you, I think I would get with Mr. Garner and say that you can offer a wireless system in Jefferson City.

I would have no further questions. Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much, gentlemen. We appreciate your testimony today. It has been most helpful.

Our final panel this afternoon is Mr. Cyril Vetter, President of WLVA TV of Baton Rouge, Louisiana, accompanied by Jay Kriegel, Senior Vice President, CBS, and Decker Anstrom, Executive Vice President of the National Cable Television Association.

STATEMENT OF CYRIL VETTER, PRESIDENT, WLVA TV, BATON ROUGE, LA, ACCOMPANIED BY JAY KRIEGEL, SENIOR VICE PRESIDENT, CBS

Mr. VETTER. Senator Inouye, I appreciate again the opportunity to speak to you. I feel like I should call you Dr. Inouye, because I am always coming to you with my problems.

In our situation, I am reminded of the Louisiana politician who took a look around at our situation down there and said, we are in a box, and the instructions on how to get out are printed on the outside.

The cable television business has been good for my station, so I am really here today to encourage the Congress and the cable industry to consider a plan for keeping both of our industries vibrant and viable.

We really are in the television business together, broadcast and cable, but under the current Federal regulatory system, broadcasters are at a significant disadvantage with cable, a disadvantage that is damaging our competitive position with every passing year, and which threatens the future strength of the free over-the-air broadcast system.

Let me describe, sir, the challenge that we and you face, and I am quoting here:

> Broadcasters face a real long-term dilemma. Free broadcast television, networks and independents provide much of the value of cable service but do not share in subscriber fees. Subscriber fees in turn are used to subsidize program services that compete with the broadcasters for audience and advertising revenue.

Now, I did not write that. No broadcaster wrote it. I wish I had written it. That was written as part of the Merrill Lynch analysis of the television business. Very simply put, the cable industry has the free use of broadcast signals to sell to subscribers to lump together with other cable program services to sell as a package.

If cable did not sell broadcast signals, the cable' industry revenues would be significantly decreased, and cable gets this extra revenue solely because it can sell local broadcast signals for which it pays nothing. That revenue is a subsidy from broadcasters to cable. Because of this subsidy, the cable has the funds to buy more and more attractive programming, taking much of it away from free over-the-air broadcast stations.

We have seen this occur with highly-viewed sporting events in dramatic fashion, and it is starting with entertainment programming as well. If the video marketplace continues in the current direction, the public interest and the American television viewer would be harmed in my view. The public will not benefit if the same programming now universally available free to every home in America becomes restricted to those who have or can afford cable and are willing to pay for those programs.

Again let me quote Merrill Lynch: "In our view, it is fair to say that the networks and local stations account for much of the value of cable service for which cable subscribers now pay $13 billion annually."

One clear example. The value which cable places on broadcast signals is the fact that cable networks give cable systems a discount if the cable network is placed next to a broadcast station. This "if carry/shall pay" plan seeks to redress the competitive imbalance between our two industries.

That imbalance—the right to sell a broadcaster's signal and not compensate the originator—can be redressed by a system which recognizes broadcasters' property interest in their signal and rewards them for the value that those signals bring to cable systems.

Sir, I do not want to impose on your patience. You have been very good to listen to our concerns and to hear from our trade organization. My statement is submitted as part of the record.

I would just like to close by saying to you that the communications policy of this country under congressional leadership has helped create a really unique system which is a blend of local and national, free and pay television that is really the envy of the world, and I believe that this modest adjustment in the economic relationship between two of its major components—broadcasting and cable—enables that policy to remain visionary.

That vision has created the American television system which provides access to everyone, rich and poor, urban and rural, from Portland to Portland and Honolulu.

Thank you, Senator Inouye, again, for the opportunity to appear before you today and express our concerns.

[The statement follows:]

TESTIMONY OF

CYRIL E. VETTER, PRESIDENT
WVLA-TV
BATON ROUGE, LA

I am Cyril E. Vetter. I am President of Vetter Communications Company, licensee of WVLA-TV, Baton Rouge, Louisiana. I appreciate the opportunity to testify today on the if carry, must pay proposal supported by NAB and other broadcasters.

Earlier today, you heard Eddie Fritts, President of NAB, discuss the adverse effects of cable television's monopoly position on the members of our industry and our support for the thrust of the Committee Staff Draft in dealing with that monopoly power. I won't repeat the points made in that testimony. Instead, I will focus on the distortion of the video market that is caused by cable television's reliance on local broadcast programs to attract customers. For many years, cable was viewed by both the Commission and the Congress as requiring regulatory protection and encouragement to grow; today, however, "the cable industry is no longer an infant industry struggling for survival."[1] Moreover, unless a new regulatory regime is instituted, the video market will be irreparably weakened by the diminishing vitality of broadcasting.

Cable's Free Use of Broadcast Signals Distorts the Video Market

Significantly, cable operators' ability to compete with local broadcasters for programming, viewers and advertising revenues stems in large part from their ability to retransmit whatever local broadcast programming they choose on any cable channel they choose -- without obtaining the consent from, or paying any compensation to, broadcasters for such retransmission.

---

[1] U.S. Congress, Office of Technology Assessment, Critical Connections: Communication for the Future 258 (1990).

Indeed, cable's use of local broadcast programming has enabled it to enjoy substantial success at the expense of the broadcasting industry which has faced increasing competition from cable, increasing programming costs, and decreasing audiences siphoned off to cable.

Using the subscriber fees generated by retransmitting broadcast signals as a base, the cable industry has developed multiple revenue streams to support its operations. In contrast to over-the-air broadcasters who obtain revenue only from advertising, the cable industry now has four major revenue sources: (1) subscription fees for basic service, (2) fees for pay channels, (3) pay-per-view program payments, and (4) sale of advertising on local and network cable channels. The growth of cable revenues, fueled by huge increases in basic cable subscription rates, has been dramatic, both for operators and cable networks. Indeed, the 1988 profits of each of the three most popular basic cable services (ESPN, WTBS, and CNN) exceeded the ABC and CBS networks' combined profits.[2]

Cable's growing advantage over broadcasters is further accentuated by its lower program costs. For local broadcast signals, which remain the heart of most systems' basic tier, cable pays nothing at all. For distant broadcast signals, the only costs are transmission expenses and a statutory copyright payment, the sum of which does not begin to equal the broadcaster's cost of obtaining and presenting the programming. Indeed, the percentage of revenues which independent stations pay for programming is almost three times greater than the amount for cable systems.[3]

---

[2] The New York Times, February 26, 1989, Section 3 at 6. Of course, many of the networks supplying basic cable programming are jointly owned with the large cable MSOs, adding further to their revenue stream.

The results of these strategic advantages can be seen in the financial returns for the broadcast and cable industries since passage of the Cable Act in 1984. In 1988, the operating cash flow margin for the cable industry (operators and networks) was 36.8 percent, almost double the 20.8 percent figure for broadcasting.[4] Since 1984, this represented a compounded annual growth of 27.9 percent for cable, in contrast to a 7.9 percent figure for broadcasting.[5] During the same period, pretax operating income for the cable industry grew at a compounded annual rate of 30.3 percent, as opposed to a 6.4 percent compounded increase for broadcasters. Indeed, the broadcasting industry's 1988 pretax operating income margin was less than its 1984 results.[6]

---

[3] Comments of NAB in MM Dkt. No. 89-600, filed March 1, 1990, at 33 (attached hereto).

[4] Veronis, Suhler & Associates, Inc., Communications Industry Forecast: 1989-1993, June 1989 at 17.

[5] Id. at 19.

[6] Id.

As cable operators succeed in moving programming, viewers, and advertising to cable, their strategic superiority will become insuperable. Cable will buy more and more valuable programming; its channels will attract more viewers and more advertising; and broadcasters will steadily lose their sole revenue source. If the video marketplace continues in its current direction, the certain result is that broadcast programming, both local and network, will suffer.

The public interest will be harmed by this development in several ways. There will, of course, always be television homes without access to cable, either because of viewer's inability to pay cable's charges, or because there is no local cable service.[7] The quality and variety of the programs available in these homes will decline. Once cable's dominance of the programming market is secure, cable operators will have no reason not to move programs now offered as basic services to pay tiers or to pay-per-view offerings.[8] No public benefit will have been achieved if programs now seen over-the-air become available only as expensive, pay offerings.

---

[7] At this time, approximately 42% of television households passed by cable do not subscribe to cable service, and 12% of television homes are not passed by a cable system. Cable TV Investor, April 27, 1989 at 8.

[8] Indeed, this migration has already begun as several TCI systems have removed the most popular cable networks from their basic tier offerings and placed them on a new, expanded basic tier available at extra cost, without reducing the price of basic service. See "New Fees Alter 'Basic' Idea of Cable TV," Wall Street Journal, January 23, 1990 at B-1.

The irony is that cable's growth to the point where it threatens the free broadcast system was based entirely on the public's desire for local broadcast signals. Moreover, as the most watched portion of a cable system's offering, local broadcast signals continue to contribute great value to cable operators. Not the least significant benefit which cable operators get from broadcast signals is the ability to intersperse cable channels among broadcast signals, and thus increase the audience for the cable services. The value of cable is also enhanced by its ability to offer both off-the-air signals and cable channels as a package; indeed it is unlikely that cable could maintain its high penetration figures without carrying local signals. A survey of subscriber attitudes showed that almost half of cable subscribers would be likely to drop the service if it no longer carried "some of the local stations that [the subscriber is] used to watching."[9]

A recent study commissioned by the cable industry concluded that local stations accounted for between $3 and $5 per month per subscriber of a cable operator's net operating revenue.[10] With more than 50 million homes now subscribing to cable, this would mean that local broadcasters contribute $1.8 to $3.0 billion annually to the cable industry.[11] Another recent study conducted to help cable systems arrive at the most profitable program mix found that carriage of local signal was responsible for 56% of a typical cable system's gross revenues.[12]

---

[9] ELRA Group, Outdoor Antennas, Reception of Local Television Signals and Cable Television 29-30 (Jan. 1986), submitted with the Comments of the National Association of Broadcasters in MM Docket 88-138.

[10] Cablevision, January 30, 1989 at 34. By contrast, the same study estimated that pay services contributed between $1.00 and $4.00, while basic cable networks contributed only $.10 to $.40 per subscriber per month. Id.

While it is true, of course, that local stations benefit from cable carriage, the net value of cable retransmission of local signals clearly runs to the cable operator, not the station.[13] This fact is aptly illustrated by cable's relationships with other cable programmers. Unlike broadcasters, many cable channels are entirely dependent upon cable carriage to reach their audience. Cable systems, however, pay such programmers substantial amounts for the right to carry their signals.

---

[11] A recent Merrill Lynch study concluded that:

> "In our view it is fair to say that the networks account for much of the value of the cable service for which subscribers now pay $13 billion annually. It is clear cable operators and cable originated program services are essentially subsidized by the broadcast networks and television stations."

Merrill Lynch Capital Markets, The Year Ahead: Broadcasting 43 (December 13, 1988).

[12] Paul Kagan Associates, Inc., Marketing New Media, January 15, 1990 at 3.

[13] The differential is a function of the fact that the subscription revenues generated by cable carriage of broadcast signals greatly exceed the incremental advertising revenues that such carriage provides to local broadcasting stations.

The If Carry, Must Pay Proposal

We believe the imbalance caused by cable operators' free access to broadcast signals can only be fully redressed by a system which combines carriage requirements to guarantee access by broadcasters with a retransmission fee which recognizes broadcasters' property interest in their signals and rewards them for the value their signals bring to cable systems. The if carry, must pay proposal accomplishes these goals.

The proposal before you would extend the bar on retransmission of broadcast signals applicable to all other media to cable.[14] Operating as an incentive statute, cable systems would not be required to carry any local broadcast signals at all. In other words, every cable operator would have the option of providing a stand-alone competitive alternative to local over-the-air broadcasters, thereby obtaining no benefits from local broadcasters, nor incurring any obligations to them. If a cable system chooses to carry any local signals, however, it would incur obligations for carriage of a reasonable number of local broadcast signals and for payment of a retransmission consent fee.

The carriage obligations we have proposed are substantially the same as in the Committee Staff Draft. While that draft ties these obligations to the statutory benefit provided to cable by the compulsory copyright license, carriage obligations under the if carry, must pay proposal would be tied to the benefit cable would derive from a newly enacted compulsory retransmission right for local broadcast signals. We do not believe that basing the carriage obligation on retransmission consent, rather than the compulsory license, would change the constitutional analysis of the legislation.[15]

---

[14] *See* Section 325 of the Communications Act, 47 U.S.C. § 325.

A cable system choosing to carry local broadcast signals would also make an annual deposit of a statutory retransmission fee with the FCC, much as stations carrying distant signals pay a copyright license fee to the Copyright Royalty Tribunal. Under our proposal, the FCC would consolidate all of the fees paid by cable systems in each television market. After subtracting the cost of its proceedings, the FCC would divide the remaining funds for each market into two funds -- one for copyright holders of programming appearing on local stations carried by cable, and one for local broadcasters carried by cable.

The Commission would divide the copyright fund, which is 20% of the total, among the copyright holders whose programs contributed to the value derived by cable operators in the market. The remaining 80% would be allocated to local broadcasters carried by cable systems. The bill you have in front of you would have the FCC determine value by the ratings each program carried on a cable system achieved in cable households. Because of their unique contribution to broadcast diversity -- which may often not be reflected in ratings -- the public stations in each market would receive double the portion of the fund allocable to their ratings share. Of the remaining amount, independent stations would be paid the percentage allocable to their ratings. For network affiliates, the stations would be paid the full value of their non-network programming, and one third of the value of their network programs. The remaining two thirds of the fund allocated to network programming would be paid to the networks.

---

[15] Attached to this testimony are the Comments which NAB filed in the FCC's current cable policy inquiry, which contain a detailed explanation for the rationale and support behind the if carry, must pay proposal.

Finally, in order to ensure that the retransmission fees are not simply passed on to consumers, the if carry, must pay proposal contains the same effective competition and rate regulation provisions as the Committee Staff Draft.

By restricting the unjustified revenue transfer from broadcasters to cable operators, the if carry, must pay proposal would restore competitive balance between the two industries. It would restrict the unfettered growth of cable revenues stemming from carriage of broadcast signals and, therefore, deter cable's use of monopoly profits to siphon off broadcast programming and restrict broadcasters' ability to serve their local publics with news and public affairs programs. Also, our proposal would maintain the existing compulsory copyright license and, by placing retransmission consent on a similar basis, would expand the transactional efficiency the compulsory license was created to achieve.

Broadcasters have devoted much time and attention to the relationship between local television stations and cable. We believe that a regime such as the one we have proposed combining carriage and retransmission payments offers the best hope of redressing the competitive imbalance that will otherwise lead to the almost inevitable collapse of the Nation's system of free, over-the-air broadcasting.

I appreciate the opportunity to explain our proposal and I commend it to your attention. I would be pleased to respond to any questions.

Senator INOUYE. Mr. Kriegel, would you like to add something to that?

Mr. KRIEGEL. I would just like to add in reference to the remarks earlier from representatives of the cable industry, I was struck that Mr. Hostetter said that he would not object to paying for broadcast signals but what he objected to in our proposal was the notion of having to purchase all the signals in one market together in a package. What he wanted was to have the marketplace operating.

Ideally, we all would like that. We all would like to have the marketplace operating. One has to be somewhat amused at the cable industry citing the protection of the antitrust laws against the broadcasters in markets where there is only one cable operator and who can deal separately with all of the broadcast stations.

In fact, the question of whether or not this should be done in a free marketplace or by legislation I think is really a public policy issue for the Congress, because what would happen under that formulation is that most of our affiliates and most of the affiliates of the three major networks would probably do pretty well; that the station that is delivering "Cosby" or "Roseanne" or "Murder, She Wrote" or the Superbowl or the NBA would probably get purchased and paid. The people who would get picked off would be the weaker stations, many of them being independents, which is what the cable industry said in the testimony earlier today.

I think it is really up to the Congress to decide if in a situation like that you want to allow this awesome power of the cable operator in a single market to pick and choose which broadcast station should in fact survive and get stronger or whether that is something the Congress wants to determine for itself.

Thank you, sir.

Senator INOUYE. Thank you.

Mr. Anstrom.

STATEMENT OF DECKER ANSTROM, EXECUTIVE VICE PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. ANSTROM. Thank you, Mr. Chairman. Our views on NAB's "must pay" scheme are detailed in the formal testimony that Jim

Mooney submitted to this committee earlier today. I would like to review briefly, however, the core of the broadcasters' "must pay" plan. If a cable operator chooses to carry even one broadcast station, he must carry virtually every local broadcast station, and then the operator must pay a percentage of his revenues, which broadcasters frequently say is 20 percent, for the privilege of complying with the first part of the scheme.

Now for 30 years the broadcasters have insisted that cable companies be required to carry all local broadcast signals complete with ads. As the committee is well aware, this has been part of Federal communications policy until late 1987.

The broadcasters were before this very committee as recently as last October urging that the policy be reinstated, but today they have a new wrinkle. The broadcasters now argue with a straight face that because cable systems charge monthly fees to subscribers and because viewers spend the majority of their time watching broadcast programming, the cable operator must now pay the broadcaster for the privilege of offering people an antenna service that clears up and extends the broadcaster's signal.

This argument is flawed in many ways. First, this scheme is blatantly anticonsumer. It says people should pay the broadcasters for something the broadcasters tout as free. The notion that it would not be the consumer but the cable operator who pays is ludicrous. The consumer would get nothing new but would have to start paying a higher bill to get something which under Federal law the broadcaster has to put on the airwaves without charge.

Cable companies would have little choice but to raise rates to consumers while offering them nothing new in return, all for the sake of improving the broadcasters' balance sheets. No business in America, Mr. Chairman, could withstand a 20 percent hit on revenues without raising its prices, and cable is no exception. Even if cable rates were reregulated, no responsible regulatory authority could refuse to pass on to the consumer most, if not all, of these additional costs.

Second, where cable carriage of broadcast stations is concerned, cable provides an antenna service that benefits not only consumers but also broadcasters. We improve the broadcaster's signal quality, and we improve his reach, and the broadcaster benefits through larger audiences and increased ad revenues. This is precisely why "must carry" has always been so important to the broadcasters.

Now after demanding and getting mandatory free carriage for years, the broadcasters are denouncing this whole practice as thievery. They apparently believe that policymakers not only have short memories but, indeed, memories that do not extend to last October.

Quite frankly, Mr. Chairman, we do not see how the broadcasters can have it both ways. If what they want is mandatory carriage, the operator should not be required to both carry a local station and pay for it. This is simply unfair and would never meet constitutional muster.

"Must pay" also signifies a significant shift in the broadcasting industry's view toward pay television. Under their "must pay" proposal, local broadcast stations would in essence become local cable networks while cheerfully touting themselves as free TV.

Now if what the broadcasters really want is not "must carry" but the opportunity for each station relying on its own strengths to be paid for carriage, they should say so, and we can debate the merits of the local compulsory license. However, we would strongly advise the broadcasters to consider the implications of a world in which marketplace negotiations would determine who is carried and who is not carried. The potential for consumer frustration and, indeed, anger, in this sort of world would be substantial.

We are not the only ones who found some serious flaws in this "must pay" scheme. FCC Chairman Al Sikes has termed it "wrong-headed," and the Motion Picture Association of America has said it would not support it. Mr. Chairman, if NCTA, MPAA and Al Sikes can agree on something, it seems to me we should all take note.

The cable industry's position on "must carry" remains clear. We support it. We have even agreed to expand it beyond the most recent set of "must carry" rules, as we testified before you last October. Yesterday we announced an agreement with the National Association of Public Television Stations aimed at guaranteeing them carriage on cable systems.

Mr. Chairman, we continue to believe that the most constructive course would be what you urged last fall and what we agreed to do but the broadcast trade associations refused to do; that is, to put aside this incessant bickering and enact a "must carry" law.

Thank you.

Senator INOUYE. Does carriage of the networks' free over-the-air broadcast signals add to the attractiveness of cable?

Mr. ANSTROM. Mr. Chairman, just to be very clear, what we are talking about is the carriage of the local broadcast affiliate; and yes, there is some value to the cable operator that does occur principally because consumers find that it is a consumer friendly way of being able to get through one mechanism the entire set of television programming that they are offered.

I also would hasten to point out again that there are substantial benefits for the broadcasters. They get their picture improved without absolutely spending a dime, and they increase their reach by reaching homes that are not satisfied with their reception which immediately transfers into increased ad revenue. In fact, Mr. Fritts testified precisely to this effect before you last year.

In the end, we believe that consumers benefit because, again, they have a consumer friendly way of getting the broad range of television signals in which they are interested.

Senator INOUYE. Free over-the-air broadcasters have all contended that it is in our national interest to maintain a strong, viable system that has the free over-the-air system.

Do you agree with that?

Mr. ANSTROM. Yes, we do, Mr. Chairman. In fact, you will not hear our trade association or our member companies belittling or in any way criticizing the very important contributions that broadcast television makes. That is one of the reasons we have tried now for more than a year, and agreed with the very reasonable proposal that you put on the table last October, to resolve this issue and enact a "must carry" bill, a "must carry" bill that goes beyond the most recent set of FCC rules.

We have made a series of concessions. We are trying to be responsive to broadcasters. We would like to resolve this.

Senator INOUYE. Do you agree that if nothing is done with the present situation, free over-the-air broadcast is in grave jeopardy?

Mr. ANSTROM. Our view, Mr. Chairman, is that the statements of the broadcast industry that they are in jeopardy frankly are exaggerated. If one steps back and looks at the relative positions of the broadcast industry and the cable industry, we find, for example, that the broadcast industry has revenues of about $26 billion, and the cable industry has revenues of $15 billion. We paid more than $20 billion to build our spectrum—namely, coaxial cable—and they get it for free through the spectrum.

We have a variety of local franchising requirements and costs which you discussed with Mr. Mooney earlier today. The broadcasters have no such costs. They have 82 percent of the viewing share. We have 15 percent of the viewing share.

Frankly, Mr. Chairman, we think that we would aspire someday to be as successful as the broadcast industry. It is a very healthy, vibrant business.

Senator INOUYE. Mr. Vetter and Mr. Kriegel, do you agree with the responses of Mr. Anstrom?

Mr. VETTER. Well, Senator, I think the business is certainly a very vibrant and viable business today, but I believe that if the competitive imbalance that currently exists—and let me digress for a minute.

Again, cable television is good for my television station, and so I am really in a box. There is no other industry in our economy where one service provider can take the service of another, bundle it and sell it and not compensate the originator. None. It does not exist.

So to the extent that Mr. Anstrom said that the broadcast business is vibrant and viable, that is true because we try very hard to satisfy, and we have managed to create a system that delivers quality and popular programming to the American television consumer. But this tilt, this competitive imbalance, if allowed to stay, does not bode well for that vibrance in the future.

Senator INOUYE. How do you respond to Mr. Anstrom's suggestion that through the cable system he has added to the value of your signals by providing clarity?

Mr. VETTER. I think that is true, and I would not disagree with that.

Senator INOUYE. He does not charge you; therefore, you should not charge him?

Mr. VETTER. It is a mutually beneficial relationship, but, clearly, the benefit is much greater to the cable system than it is to the broadcaster because our circulation is only incrementally increased, where his penetration is driven by the popularity and the demand for the local broadcast stations. In fact, cable networks afford discounts to cable systems if they are positioned in between broadcast stations.

Senator INOUYE. Mr. Kriegel.

Mr. KRIEGEL. Well, we have a vibrant business. We have a terrific business. This system of national programming services distributed through 200 local affiliates across the country is a great American invention which we think is demonstrated every day that the public likes and supports it.

But there is a fundamental economic anomaly here in our system. We have cable channels with 1/20 of the rating of the national networks where, for example, two or three of them made more profit in 1988 than ABC and CBS combined. We had ten times the revenue and made one-half the profit.

Now that is not because they provided more popular programming. It is not because they had something so special that consumers wanted it. It is because there is a strange structure because of existing law that allows our money to flow into the cable industry back into their own channels.

We are subsidizing the growth of our own competitors. To that end, this notion of Mr. Anstrom that there is no benefit here to consumers, it is a little hard to tell a Yankee fan in New York who last year got all of his games on free television and then this year gets none of them and has to pay $15 or $20 a month to get the same thing he had last year that there is consumer benefit in this system by which cable is able to outbid over-the-air stations for the very same product and service that used to be available free.

Our concern is that that is where the trend is going. Our concern is that, given the subsidy, we are enabling cable channels to slowly moderate programming beginning with sports but moving toward entertainment onto cable so that what was once free will in four, five or ten years all be paid for. That is hardly a consumer benefit, Senator.

Mr. VETTER. Sir, the genius of the Communications Act was that allowed a system to develop that was universally accessible to everyone, irrespective of income, irrespective of geographic location. That really is a system that is threatened when there is a tilt like the one that presently exists in favor of pay television.

Mr. ANSTROM. Mr. Chairman, if I may respond briefly. I would like to comment on the statements from my two colleagues here. First, I know you are a student of history, and I think we have a revisionist history being told here with respect to the notion that somehow cable's carriage of broadcast signals represents a subsidy.

Again, the very clear fact is, Mr. Chairman, as you well know, that the broadcast industry, for 30 years, has insisted that broadcast signals be carried on a mandatory basis, free of charge, complete with ads, on cable systems. That is the history.

And the reason, as the federal court of appeals said in the Quincy case, is because those rules tended to reinforce economic benefits for the broadcaster that relate to the issues I talked about earlier.

And I think that it is very important, again, to be clear about the origins of this.

Now, again, if what the broadcast community is really saying is that they are not interested in must carry, and rather, they would like to move to a free market world in which the strong survive and the weak do not, we can have that debate. But our view continues to be that the sort of reasonable must carry compromise that you proposed last fall makes the best sense, would reduce this bickering, and let us get on with serving the American public.

Mr. VETTER. Senator, I would respectfully suggest that there is a giant difference between revisionist history and understanding the dynamics of history unfolding. And that is what we are asking you to consider at this point. That this is a dynamic transitional process that we are observing.

And if you will permit me this indulgence, I just want to read this objective analysis of this dilemma one more time, and it comes not from our industry, it comes from Wall Street.

Broadcasters face a real long-term dilemma. Free broadcast television, networks and independents, provide much of the value of cable service, but do not share in subscriber fees. Subscriber fees, in turn, are used to subsidize program services that compete with broadcasters for audience and revenue.

Sir, that is not revisionist history; that is the dynamism of history in progress.

Mr. KRIEGEL. On the same point, no one is changing history. What has changed in the last 10 years is the nature of the relationship between the two industries. In the 1970s, cable only carried broadcast signals. There were no cable channels. Cable only had one revenue stream, subscriber fees.

At that point in time we had two perfectly complementary industries. What has happened now is cable has many of its own channels, taking our revenue, and going out and competing with us for advertising. So they have invaded our revenue stream, as well.

Where cable had no advertising revenue a few years ago, there is now $1.5 billion, and all the projections are, in the next five years, it will go to about $5.5 billion.

So far, it has come out of the national networks. But we are just beginning to see it come out of the local stations. And what you are going to see in the next few years is extraordinary growth of advertising revenue coming away from local broadcast stations to cable stations, who are also getting the subscriber fees, which gives them overwhelming economic leverage.

So when we go into the marketplace to bid for football games, as we just did, and the broadcast networks pay staggering amounts of money, which we are happy to do because it is a great property and a great event and our viewers like it, we bid against cable networks. We pay the exact same amount, turn around and charge the viewers for half that money, get half the money right away up front, and then go out and charge the same advertisers that we are billing the same amount of money. They are making a profit; we are losing money.

We cannot keep those events on free television if that is going to be the future dynamics.

Senator INOUYE. And that shall be the last word, sir.

Mr. KRIEGEL. Thank you, sir.

Senator INOUYE. I thank you very much for your participation this afternoon.

This committee will stand in recess until next Wednesday at 9:00 a.m., when we will continue our hearings.

[Whereupon, at 6:30 p.m., the hearing was adjourned.]

CABLE TV CONSUMER PROTECTION ACT OF 1989

WEDNESDAY, APRIL 4, 1990

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Communications,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:00 a.m. in room SR-253, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR INOUYE

Senator Inouye. Today we are holding the subcommittee's second day of hearings on the committee substitute for S. 1880, the Cable Television Consumer Protection Act. This will be the subcommittee's final day of hearings prior to the full committee's marking up on this legislation which I expect to occur shortly.

By any measure, this subcommittee has laid the proper foundation for legislation. With today's hearing, the subcommittee will have held nine cable-related hearings during the past year, and we will have heard from some 65 different witnesses for over some 34 hours.

The first panel at today's hearing will focus on the question of telephone company entry into the video marketplace. The committee staff draft contains a provision that eases the provision of a broad brand telephone network by restricting the role of local cable franchise authorities in certain instances.

I know that the cable industry opposes this provision because they would still be subject to the multitude of requirements and costs imposed by these franchise authorities. I understand that many of the telephone industry oppose this provision because it lifts the franchise requirement only of the operators as common carriers without controlling any programming content, and they wish to control such content.

Finally, the franchise authorities oppose this measure because they wish to control the local provision of video services.

As a general rule, any provision that is opposed by all sides cannot be all that bad, and so I would like to congratulate the staff for finding this elusive middle ground. This cable telco issue will be debated this morning by an expert panel. The telephone industry will be represented by Mr. Gray Collins, Executive Vice President at Bell Atlantic; Kent Foster, President of GTE Telephone Operations; and Richard Hunt, Vice President of HunTel Systems.

Representing the cable industry are Phillip Verveer of the law firm of Wilke, Farr and Gallagher; and Mr. Thomas Gillett of the Cable Television Laboratories.

The final witness on this panel is Mr. John McLaughlin with the Harvard University Center for Information Programs.

In addition to debating the cable telco issue, we will hear from a variety of witnesses about other aspects of the draft. Mayor Lila Cockrell from San Antonio will testify on behalf of the League of Cities and will discuss their concerns about this draft.

John Kompas, President of the Community Television Association will speak about the concerns of the low power television stations.

We will also hear from representatives of several firms that compete or want to compete with existing cable systems: Mr. Harold Cushing, President of Competitive Cable Association; the Honorable Wilbur Mills and Daniel Garner with Advanced Communications Corporation; and Mr. Robert Swander, President of MaxTel Cablevision.

May I now call upon my very distinguished colleague, Senator Exon.

OPENING STATEMENT BY SENATOR EXON

Senator Exon. Mr. Chairman, thank you very much. I want to congratulate you first for calling this hearing. I think we can all tell by the large number of witnesses that we have today and the large attendance that we have at this meeting that this is a very, very important consideration that our subcommittee must address. I guess we have been putting this off for a long, long time.

I first want to thank all of the interested and competing parties for advising us on this from time to time. I guess most of us have met with many of you in one form or another over the last year or so with regard to this issue.

Mr. Chairman, I just want to tell you that as one Member of this subcommittee I have made no final determination on what the direction should be in this area; but there must be direction and that is why I am very pleased that you called this hearing this morning so that we can begin to get to the heart of this very, very important matter.

I suggest that primarily we must look at this from a consumer standpoint. The consumers are the ones that eventually are going to be very much affected one way or the other on what direction we make with the increased technology that is coming into the marketplace. When new technology comes in, that is always good in the ultimate end, but sometimes we run through some barbed wire in legislation, pro or con, on these issues.

I suggest that what is at stake here basically, Mr. Chairman, is a fight for control of the wire that goes into the homes of America today. I think therein lies a very important matter for the consumers of the United States at large because if there is monopoly control on the wire going into a household in the United States, there lie some dangerous signals at least with regard to the controlling of what goes over those wires and the communications and information which are all part and parcel of wires and the various deviations thereof.

So I am looking forward to the testimony this morning. I must tell you, Mr. Chairman, all of us have lots of conflicting schedules. I have two other committee meetings going on at the present time. By necessity, therefore, I will have to be in and out of the meeting, but I will be looking very closely at the testimony that we receive.

Thank you very much.

Senator **Inouye**. Thank you.

Senator Packwood.

Senator **Packwood**. Mr. Chairman, I have a 10:00 a.m. meeting, so I do not want to take any more time here. I will pass.

Senator **Inouye**. Now may I call upon the first panel: Mr. Collins, Mr. Foster, Mr. Gillett, Mr. Verveer, Mr. McLaughlin, and Mr. Hunt.

May I begin with Mr. Hunt at this time. My colleague, Senator Exon, would like to introduce him.

Senator **Exon**. Mr. Chairman, I appreciate the courtesy.

Richard Hunt not only is a very successful and prominent businessman from Blair, Nebraska, which is a little ways north of Omaha, Nebraska, but was recently selected as Nebraska Businessman of the Year. He is very much informed about the issues that we are addressing here this morning.

Richard, as one of your United States Senators, I want to congratulate you on your recent award and welcome you to this hearing.

Senator **Inouye**. We expect good testimony from you.

STATEMENT OF RICHARD HUNT, VICE PRESIDENT, HUNTEL SYSTEMS, ON BEHALF OF U.S. TELEPHONE ASSOCIATION

Mr. **Hunt**. That is rather intimidating.

Good morning, Mr. Chairman and fellow cornhusker, Senator Exon, and other committee members. My name is Richard Hunt from Blair, Nebraska. My brother and I own and operate HunTel Systems, a family of related telecommunications companies. I am pleased to testify here before you representing HunTel and the United States Telephone Association, the national representative body of the local exchange industry.

Mr. Chairman, I am here to deliver two messages. First, in the telecommunications arena, that competition is superior to regulation in promoting customer benefits and technological advances and, further, that telephone companies are logical competitors for the cable operators. We hope this committee will first look to competition and only in its absence to regulation in addressing the delivery of cable television services. Telco competition will not only protect consumers but will also serve as an incentive to help this Nation rebuild its telecommunications infrastructure.

The second message is that despite the claims of our detractors, the competitive marketplace is not weighted in favor of the telcos. There have been and will be times in the future in which, despite our best efforts, the telephone companies will lose; but while one industry might be unsuccessful in a given locale, the real winners will always be the American consumer and the competitive posture of America in the global marketplace.

HunTel is a small but diverse telephone company. We provide local exchange service to about 10,000 customers in 14 communities in Eastern and Northern Nebraska and also provide cable television services to about 980 households in small of our smaller communities we serve.

HunTel has built and operated a dozen cable television systems. I believe that our experience in the City of Kearney, Nebraska will document my dual theme. City officials in Kearney approached HunTel and requested that we come in and overbuild the city to provide a competitive alternative to the incumbent cable system, a national MSO. The city's request was in reaction to the incumbent cable system's escalating rates and perceived insensitive service standards.

We were convinced that we could build a cable system to provide double or even triple the number of channels and vastly improve the quality of service at rates competitive with the rates that were being charged, and so we agreed to do this.

Initially most customers did switch over to our system. Responding to this competitive threat, however, the other company withdrew their application for a rate increase and added channels, greatly improved service, and ultimately reduced their rates. We were finally forced to sell because we were the victims of cross-subsidy by our competitors. While dropping the rates in Kearney, they neither dropped their rates nor improved their service in the surrounding communities.

Mr. Chairman, I believe there are several lessons to be learned from our Kearney experience. We demonstrated that telcos know how to compete, and although we did not succeed the citizens of Kearney benefitted greatly by our willingness to take a risk.

It further demonstrates that competition and not regulation brought down prices and improved the quality of service to the citizens of Kearney. If telephone companies are permitted to compete with existing cable companies, there is no guarantee that we will succeed, but there is no doubt that even the threat of competition will benefit cable consumers.

We need to ensure that all Americans can participate, both urban and rural, rich and poor, or rural customers will never get cable television services if we do not provide them. It is not just the rights of individual video entertainment consumers that are at stake.

This Nation is faced with a global market challenge. While it has been fashionable to feel threatened by Japan and a united Europe, there is no doubt in my mind that the U.S. industry can compete effectively; but we must be permitted to compete. We are eager to compete, and it is in this Nation's long-range national interest to permit the telecommunications industry to compete, not just to control rates and quality of service to cable television customers but, more importantly, foreign nations' long-range economic well being.

The Congress and U.S. industry, too, have been rightfully criticized, I believe, for failing to plan for the long range. Here is an opportunity for Congress to unleash American industry to compete in the technology of the next century. If the United States telecommunications industry is permitted to compete in the video market, it will accelerate the installation of a fiber network across the Nation, not just in urban and metropolitan areas but also in rural America. Rural America will be fibered because rural telephone companies are typically led by entrepreneurs.

We know what this Nation's telecommunications infrastructure needs to continue its leadership role in the world economy. By endorsing the competitive resolution to cable proposed in S. 1068, this committee will do much more than merely permit telcos' entry into cable. You will allow this Nation to prepare for the economic and social challenges of the next century with new vigor and the newest of tools of modern competitive information infrastructure.

Thank you very much.

[The following information was subsequenty received for the record:]

HunTel Systems

402-426-6211

26 April, 1990

Ms. Antoinette D. Cook, Counsel
United States Senate
Committee of Commerce, Science, and Transportation
Washington, D.C. 20510-6125

Dear Ms. Cook:

Here are answers to the questions that you mailed to me from Senator Kerry.

1. Question: Does not the creation of a fiber optic network constitute an alternative to the existing coax network? Would not this new network serve as another competitive check on any monopolistic tendencies of the cable companies?

Answer: Fiber optic networks have significantly more capacity than coax networks. Therefore, the direct answer to your question is yes, a fiber network would be capable of competing with a coax network, and therefore would serve as a competitive check on monopolistic tendencies of the cable companies.

Comment: Although there is much interest on the part of all interested parties in fiber optic networks, I think of myself as a provider of telecommunications services, not as a "hardware provider". I will use the most long-range, cost-effective technology at my disposal to compete. There is little doubt that the technology of the future is fiber optics. I don't foresee being able to provide entertainment video services competitively with our present copper network, but it might become possible. In any case, the telephone industry is not asking for the right to build fiber optic networks. We are asking for the right to provide entertainment video services because it is a natural extension of the telecommunications services that we are offering now. So long as we are being prevented from offering entertainment video services, or ANY telecommunication service, we will be prevented from utilizing our facilities most efficiently.

1638 Lincoln Street / P.O. Box 400 / Blair, Nebraska 68008-0400 / (402) 426-2101
Arlington Telephone Company / Blair Telephone Company / Eastern Nebraska Telephone Company / Rock County Telephone Company / Bassett CableVision / Diamond CableVision / Telmans

2. Question: Would the cable companies object to allowing the telco's to provide programming services on some, but not all, of the channels on a broadband network? If so, why?

Answer: I cannot answer for the cable companies. Although it's better to compete with one hand tied behind my back than both hands, I'd be a much more effective competitor if I'm not restricted to the wishes of the cable industry.

3. Question: What are the international competitive consequences of delaying the development of fiber optic networks? Would delay inhibit the development of products or services downstream?

Answer: This, I believe, is the most important question. I presume that it is self-evident that the telecommunications industry ought to benefit from having the opportunity to provide entertainment video services. But the first interest of Congress is the long-range interest of the nation as a whole in the world economy. The American consumer will benefit directly if Congress permits the telecommunications industry to compete by providing entertainment video services. But beyond that, the entire nation will be able to compete more effectively first and foremost in the telecommunications arena. Secondarily, ALL industry will be able to compete more effectively to the extent that our industry provides better, lower cost, telecommunications services.

Sincerely,

Richard A. Hunt

Senator INOUYE. Thank you very much, Mr. Hunt. May I now call upon Mr. Collins, External Affairs, Executive Vice President of Bell Atlantic.

STATEMENT OF A. GRAY COLLINS, JR., EXECUTIVE VICE PRESIDENT, EXTERNAL AFFAIRS, BELL ATLANTIC

Mr. COLLINS. Thank you, Mr. Chairman. I am here to discuss Bell Atlantic's views on the cable legislation. As you know, under the existing law telephone companies can as common carriers carry broadband signals, including the signals of video programmers who have local franchises. The proposed bill does assist video programmers to use the telephone company's network by offering them relief from the franchise requirement. However, nothing explicitly allows the telephone companies to provide important ancillary services necessary to make a common carrier service attractive to cable operators and cable viewers. Those services I am referring to are billing and collection for the cable operators and menus for the viewers.

The bill also continues the prohibition against telephone companies providing video programming. Mr. Chairman, last week you suggested you wanted to enact a bill that would be a living, working cable statute for many decades. The proposed bill is a reregulation quick fix. The long-term answer is competition that invites creative and diverse players to compete.

The way to encourage cable competition is to eliminate the statutory restriction that prevents the telephone companies from functioning as full service cable television providers within their local service areas. There are two barriers to the cable competition.

First, cable companies have a private monopoly not subject to common carrier regulation on broadband transmission.

Second, most of the existing program sources are tied up by the incumbent cable operators. Telephone companies are required by law to make their facilities available on a nondiscriminatory basis, and they have the expertise to carry video signals of multiple cable operators and independent programmers. If legal barriers are removed, telephone companies would have an economic incentive to rapidly deploy new technology for any potential video programmer to use.

The principal legal barrier that must be removed to accelerate the deployment of the broadband network is the prohibition against the telephone companies providing video programming. First, removal would give the telephone companies assurance that their broadband facilities would be utilized by at least their own video services; and second, it would give the public a broader choice of programming. Telephone companies have the economic resources to finance additional programming and, therefore, are capable of increasing diversity and competition in program creation.

Allowing the telephone companies into cable would not create any realistic risk to the existing cable companies. They have their own cable delivery systems and program arrangements in place. If the existing cable operators elect to take advantage of the telephone company's broadband facilities, they would be protected by the telephone company's legal obligation to make access available to video programmers on a nondiscriminatory basis.

Mr. Chairman, if the Congress is not ready to approve legislation allowing telephone companies to become a full service cable provider, it should at least take steps to eliminate the present disincentives to the deployment of the broadband network which will encourage at least some competition.

A public fiber optic network will make the cable industry more competitive. New programmers could enter the market simply by leasing channels or even time slots on a system. Consumers will benefit because they can choose the programs and services they value without having to pay for packages of services. Bell Atlantic has installed over 400,000 miles of optic cable, and we have spent $2.7 billion in installing digital switches. This is the beginning of a broadband network.

Mr. Chairman, I believe we are doing our part. I believe Congress can do its part by removing the unnecessary impediments and allowing the telephone companies like Bell Atlantic to provide menus that will make it easy for customers to get convenient access to the kind of programs they want as well as any type of network processing and other incidental services that cable operators and their customers may desire.

The proposed legislation should be amended to make it clear that telephone companies can provide these functions. Congress should also make it clear that we can provide the nontariffed services such as billing and collection for the cable operators.

I am also concerned that the Cable Act could be interpreted to bar telephone companies from providing innovative interactive services. For example, suppose Bell Atlantic wanted to provide an interactive electronic service that helped to teach foreign languages to schoolchildren. The simultaneous transmission of graphics and sound might make that service look like a television show. Because an argument could be made that the Cable Act would bar us from providing that kind of so-called video programming, the bill should make it clear that we would be authorized to provide that type of service.

Finally, Mr. Chairman, the proposed legislation provides that when video programming is provided over a common carrier broadband network, there is no requirement to obtain a local cable franchise providing the telephone company itself has no involvement in the content.

If anybody should allege and satisfy a court that the telephone companies' activities have crossed the line into content, all the video programmers using our network according to the present bill would have to obtain a local franchise. We believe that problem needs to be addressed.

I am very grateful for the opportunity to speak with you this morning and look forward to questions.

[The statement and questions and answers follows:]

CABLE LEGISLATION

TESTIMONY OF A. GRAY COLLINS, JR.
EXECUTIVE VICE PRESIDENT, EXTERNAL AFFAIRS
BELL ATLANTIC CORPORATION

BEFORE THE
COMMUNICATIONS SUBCOMMITTEE OF THE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

My name is A. Gray Collins, and I am Bell Atlantic's Executive Vice President -- External Affairs. I am here today to discuss Bell Atlantic's views on the cable legislation which the subcommittee is now considering. I would like to thank Chairman Inouye and the members of the subcommittee for holding hearings on this very important issue.

Under existing law, telephone companies can, as common carriers, carry broadband signals, including the signals of video programmers who hold local franchises. The bill would assist programmers using a telephone company broadband network by offering them a provisional relief from any franchise requirement that might apply to them. However, nothing in the bill as presently stated allows the telephone companies to provide the ancillary services necessary to make their common carriage attractive to cable operators and cable viewers: services such as billing and collection for the operator, and menus for the viewers. Finally, the bill continues the prohibition against the telephone companies providing video programming, thereby eliminating the only realistic hope for full competition in the cable industry.

Mr. Chairman, last week you used the analogy of the '34 Communications Act, suggesting you wanted to enact a bill that would be a living, working cable statute for many decades. You did not say you were seeking simply a quick-fix. Re-regulation is the quick fix. The long term answer is competition. To achieve your goal you will need a statute that invites creative and diverse players eager to serve and compete in this vital segment of our economy, not one that merely protects the economic interests of some of the existing players.

I. Congress Should Permit Telephone Companies To Provide Cable Television Service.

The most direct way to encourage cable competition is to eliminate the statutory restriction that prevents telephone companies from functioning as full-service cable television providers within their local service areas. There are two barriers to competition in the cable industry today. The first is that the cable companies have a private monopoly, not subject to common carrier regulation, on broadband transmission. The second is that there is a scarcity of high quality programming and most of the existing programming sources are tied up by the incumbent cable operators.

Cable companies have substantial market power in part because a cable company typically has the only cable distribution system in the communities where it operates but has no common carrier obligations. Telephone companies are required by law to make their facilities available on a nondiscriminatory basis and they have the expertise to upgrade their distribution systems to enable them to carry the video signals of multiple CATV operators and independent programmers. If the legal barriers were removed, the telephone companies would have an economic incentive to speed up the deployment of this technology and the network would be available to any potential video programmer on a nondiscriminatory basis.

The principal legal barrier that must be removed if the deployment of the broadband network is to be accelerated is the prohibition against the telephone companies providing video programming. Its removal would have two critical consequences: first, it would give the telephone companies the assurance that their broadband facilities would be utilized and supported by some video service; second, it would give the public a broader choice of programming.

Competing in the cable business is beyond the economic means of most companies because, in today's market, a cable operator must also be involved in the expensive business of creating and assembling programming to be carried on their cable systems. The telephone companies, however, have the economic resources to finance additional programming and are, therefore, particularly capable of increasing competition in program creation.

The cable companies are apparently reconciled to some form of federal regulation. They still strongly oppose competition. They realize that competition will put the consumer in the driver's seat and impose a discipline on their service that regulation simply cannot duplicate. This is the very reason why competition is the preferred solution.

Allowing the telephone companies into cable would not create any realistic competitive risks to existing cable companies. Such companies have their own cable delivery systems and program arrangements in place. Consequently, cable companies could continue to bypass the telephone system altogether. On the other hand, if the existing cable operators elect to take advantage of the telephone companies' broadband facilities, they would be protected by the telephone companies' legal obligation to make access available to all video programmers on a nondiscriminatory basis.

II. At A Minimum, Congress Should Foster An Infrastructure That Will Encourage Cable Competition.

If the Congress is not ready to approve legislation allowing the telephone companies to perform the role of full service cable providers, it should at least take steps to eliminate the present disincentives to the development of a broadband network that will encourage cable competition. The construction of a public fiber optic network, capable of carrying cable television signals and a wide variety of information services, as well as ordinary telephone calls, will help to make the cable industry more competitive. A broadband network will have the capacity to allow new programmers to enter the market simply by leasing channels or even time slots on the system. Consumers will benefit because they can choose the programs and services that they value, without having to pay for packages of services that they do not want.

I want you to know that Bell Atlantic is not just talking about such a network. By the end of 1989, we had installed over 400,000 miles of fiber optic cable in our network, and had spent nearly a half billion dollars on installing digital switches. This fiber and these switches will provide the backbone of the broadband fiber network.

Mr. Chairman, we are doing our part. Congress can do its part by removing unnecessary impediments to the development of that network.

For example, Congress should allow companies like Bell Atlantic to make their broadband networks as attractive as possible to potential customers, including cable operators. That means we should be able to provide menus that will make it easy for consumers to get convenient access to the kind of programs that they want, as well as any type of network processing and any other incidental service that cable operators and their customers might find desirable.

Unfortunately, there is some uncertainty whether the current cross-ownership restrictions would permit companies such as Bell Atlantic to perform these functions. Therefore, at a minimum, the legislation before the subcommittee should be amended to make it clear that the telephone companies can do so.

There is also some uncertainty under existing law as to whether companies such as Bell Atlantic can perform services for cable companies if those services are provided under contract rather than pursuant to tariff. One example is non-tariffed billing and collection services. Here again, Bell Atlantic would like to make its services as valuable as possible to video programmers, and would therefore ask the Congress to make it clear that we can provide these services.

I am also concerned that it might be argued that the current Cable Act could be interpreted to bar telephone companies from providing a host of innovative interactive services that were never meant to be barred to the telephone companies. Let me give you an example. Suppose Bell Atlantic wanted to provide an interactive electronic service that helped to teach foreign languages to school children. A foreign telephone company, by the way, is already providing a version of this service.

The service would show children how to spell words in the foreign language, and would also provide a voice transmission that showed them how to pronounce the words. The simultaneous transmission of graphics and sound might make the service look a little like a television show and the argument could be made that the Cable Act bars us from providing such "video programming." We think that the present bill should make it clear that we are authorized to provide services of this type.

Finally, I'd like to address the draft legislation's provisions that deal with the local franchise. Where video programming is provided over a common carrier broadband network, there should be no requirement to obtain a local cable franchise, either for the video programmer or for the telephone company. The draft recognizes that but only under certain conditions. The principal condition is that the telephone company itself must have no involvement in content. This condition ought to be eliminated because it constitutes a sword of Damocles hanging over the head of any video programmer who uses the common carrier broadband network for the transmission of his programming. If anybody should allege and satisfy a court that the telephone company's activities have crossed the line into "content," all video programmers, according to the text of the present bill, will have to obtain local franchises.

The local franchise is intended to ensure that local governments have control over the way cable companies install and maintain their cable systems. The common carrier broadband network, however, does not implicate any of these concerns because it does not involve the installation of a separate cable system. Instead, it is simply an upgrade of the existing telephone network. In making this upgrade, companies like Bell Atlantic are already subject to extensive regulatory control. Another layer of local regulation is just not needed.

I am very grateful for the opportunity to present these remarks today, and would be happy to answer your questions.

QUESTIONS OF SENATOR KERRY AND THE ANSWERS

1. Does not the creation of a fiber optic network constitute an alternative to the existing coax network? Would not this new network serve as another competitive check on any monopolistic tendencies of the cable companies?

A common carrier fiber optic network would constitute an alternative to existing coaxial cable networks that could be used by competing cable operators and other program providers. Therefore, the new network would serve as a competitive check on any monopolistic tendencies of incumbent cable companies. Because a common carrier fiber optic network would allow consumers to choose among competing cable providers, both existing cable companies and new competitors would have incentives to provide high quality service at reasonable prices.

In addition, however, the common carrier fiber optic network would do more than simply provide competition to cable companies. It would be able to carry many other types of services, such as two-way, interactive educational services, medical diagnostic services, video conferencing, and other services that will be developed to take advantage of the capabilities of a common carrier fiber network.

2. Would the cable companies object to allowing the telcos to provide programming services on some, but not all, of the channels on a broadband network? If so, why?

Cable companies have objected to telephone companies being allowed to provide programming on any network they own. They have argued that, if the telephone companies both own the network and provide programs that use the network, they will have an incentive to discriminate against competing programmers who want to use the network.

The cable companies' arguments are wrong. A common carrier broadband network will have tremendous capacity, in contrast to the limited number of channels that a traditional cable system can carry. As a result, the telephone companies will have an incentive to encourage as many program providers as possible to use the network. Moreover, the telephone companies' common carrier obligation to make access available to all video programmers on a non-discriminatory basis will protect consumers and competing programmers.

Finally, traditional cable companies themselves often carry programs in which they or an affiliate has an ownership interest. The cable companies assert that their carriage of such affiliated programs does not raise policy concerns, and they cite NTIA's report which found no evidence that such carriage resulted in the exclusion of unaffiliated program services. (Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (NTIA Report 88-233) (1988).)

3. What are the international competitive consequences of delaying the development of fiber optic networks? Would delay inhibit the development of products or services downstream?

Fiber optics are necessary for a state-of-the-art telecommunications network. Fiber optics, together with other telecommunications technology that exists or is under development, will be critical to the deployment of a telecommunications infrastructure that can meet the present and future telecommunications needs of consumers and businesses.

Bell Atlantic estimates that it could take 40 to 50 years before fiber is deployed to all homes within its region at the present rate of deployment. As matters presently stand, this will be several decades after Japan has deployed fiber to all its homes. If telephone companies have incentives, such as the ability to provide video programming, however, they can accelerate the deployment of fiber optics. Bell Atlantic believes that under these circumstances it could advance its fiber deployment by several decades.

Delaying the deployment of a fiber optic network will inhibit development of new products and services. Without a network capable of delivering broadband products and services to customers, companies will have less incentive to expend the time and resources necessary to develop new products and services.

Senator INOUYE. Thank you very much, Mr. Collins.

Now may I call upon the President of GTE Telephone Operations, Mr. Foster.

STATEMENT OF KENT B. FOSTER, PRESIDENT, GTE TELEPHONE OPERATIONS, GTE CORP., IRVING, TX

Mr. FOSTER. Thank you. Good morning.

Last November I testified to the need for the development and deployment of an integrated broadband network. This modern telecommunications network could provide competition in the cable TV market and, more importantly, bring advanced innovative video and data services to American homes and businesses.

In my remarks, I emphasized that GTE and other telephone companies are prepared to make substantial investment necessary to bring this broadband network into being, but I noted that existing regulatory restrictions and legal restrictions must be removed in order to justify more rapid investment in the broadband network.

There is language in the staff draft which would make this network, once deployed, easier to use for video providers. Since such providers would not be cable operators, they would not need franchises to use our network. So the staff draft does clearly recognize the uniqueness and desirability of a telephone company-deployed broadband network.

The staff should be commended for encouraging development of an open access environment for the implementation of a wide variety of video and entertainment services. More relief is needed, however, to ensure greater utilization and more rapid evolution of that network.

For example, the same section of the staff draft dealing with franchises declares flatly that telephone companies can have no involvement whatsoever in packaging content programming. We are prohibited from even packaging and marketing over our network content developed solely by others. Without the ability to even package video programming, the telephone companies are left in the position of being nothing more than passive providers of transport facilities. Providing transport to anyone and everyone on equal terms and conditions is a necessity, and that should also include a programmer under common corporate ownership with a common carrier.

With the ability to participate in programing, the pace of broadband deployment will be significantly propelled forward, but the telephone companies need to know that if they expend the resources to install a broadband network it will have users even if those users are affiliated with the telephone company. Otherwise, the expenditures necessary to develop that network will be little more than a gamble rather than a prudent business decision.

Our industry can ill afford to build on blind leaps of faith to conduct our business. I doubt if any cable television operators would have built their own CATV systems if they could not be involved in content programming or packaging.

GTE has had discussion with various cable firms in an attempt to get them to utilize our network for video transport services. Unfortunately, we have been unsuccessful because cable networks want to protect their network exclusivity as a means of retaining their monopoly position. This clearly runs contrary to our position of deploying a common carrier network with equal access to all. Telephone companies would like to be able in that environment to prime the pump. We want to provide traditional cable television services as well as newer entertainment services such as video on demand, and we also want to deliver innovative interactive services such as health care and educational applications.

In addition, the entrepreneurial spirit of American business will undoubtedly be stimulated, and the availability of new innovative information services will flourish once this network is in place.

Now safeguards exist to deal with the concern such as the potential for cross-subsidization. In our vision, the telephone company participation in the video services business, the transport facilities and services would be owned and operated by the telephone company as a part of its regulated business.

Packaging functions, on the other hand, would be performed by a separate entity. This entity would purchase transport services from the telephone company under the same terms, prices and conditions as any other video services provider. This arrangement has been tested and has proven effective in many other applications where we have similar relationship today between regulated and unregulated businesses.

The telephone companies share the staff's objective of promoting competition in the delivery of video programming. We agree that the widest possible diversity of information sources should be made available to the public. The staff draft recognizes that because the cable operators own and control every channel on the cable system. They are tempted to favor their own programming affiliates.

The staff draft, therefore, requires the FCC to establish rules limiting the number of channels which can be occupied by such affiliates. By contrast, the telephone companies cannot use any channel. In fairness, the two transport mediums should be treated equally.

The case for the telephone company is all the more compelling because its transport would be regulated to assure equal terms, rates and conditions to all users of affiliate and nonaffiliate. In contrast to the impediments placed in the way of American telephone companies, foreign telephone companies are today rapidly improving their networks, and the results are both dramatic and disturbing.

For example, in 1988 50 percent of the world's fiber was deployed in North America. In 1989 that figure fell to 44 percent with Western Europe and Japan being the big gainers. This is more than just an indication of the relative pace of telecommunications infrastructure development. It also influences the pace at which broader technologies are being developed in other countries.

Attached to my testimony is a brief discussion of the relative pace of development of the telecommunication networks of several other countries.

I am hopeful that as Congress considers making changes to the Communications Act you will allow the telephone companies to compete in video services business and ensure that the telecommunications network of the United States is second to none in the world.

Thank you.
[The questions and answers follow:]

FOLLOW-UP QUESTIONS FROM SENATOR KERRY ON TELCO HEARING - (4/4/90)

1) Does not the creation of a fiber optic network constitute an alternative to the existing coax network? Would not this new network serve as another competitive check on any monopolistic tendencies of the cable companies?

RESPONSE:

The creation of a fiber optic network to the home which is also equipped with broadband switching, has the POTENTIAL to be both an alternative to and, therefore, competitive with cable companies. Over that network, the telephone companies would be able to provide voice, data, and video on an integrated basis over a common transmission path.

If it is considered desirable to achieve this competitive environment as soon as is practical, then changes should be made in the Cable Act of 1984 to permit telephone companies to be full and active participants in the video services business, including programming within their serving areas. This will remove much of the economic uncertainty which will otherwise deter telephone companies from making the necessary investments to build the network.

Even with the lack of incentive in the short term, we believe that economics will improve over time and the telcos will deploy that network over the next 20-30 years. Entry into video services, by the telephone companies, could reduce that time to 10-15 years.

2) Would the cable companies object to allowing the telcos to provide programming services on some, but not all, of the channels on a broadband network? If so, why?

RESPONSE:

Under the current arrangements, the cable companies operate as virtual unregulated monopolies. GTE cannot speak for them, but it is reasonable to assume that they will continue to oppose competition from the telephone companies or anyone else. We do not believe that telephone company use of some of the channels on the network would be acceptable to the cable companies simply because it would hasten the day when their monopoly position will be challenged. Competition in the marketplace would result in the loss of "monopoly rents" and would force the cable companies to simultaneously reduce prices and improve service to maintain their customer base. In addition, it would drive down the value of the existing cable companies which are being sold at two to three times their construction cost per subscriber.

GTE recommended, in its comments in FCC Docket 89-600, that the telephone company should be able to use some portion of the broadband capacity it builds. This would give the telephone company the ability to assure itself that there would be use made of its network. At the same time it would assure that there is adequate capacity for competitive entertainment and information services.

GTE's view is that access to and transport over its proposed switched broadband network would be a regulated common carrier service available to all providers of video content, including its own program provider, at equal rates, terms, and conditions. This open access would be in stark contrast to the closed and tightly controlled access that cable operators have over their networks.

3) What are the international competitive consequences of delaying the development of fiber optic networks? Would delay inhibit the development of products or services downstream?

RESPONSE:

The attached "white-paper," which was part of my testimony at the Senate hearings on April 4, 1990, provides a more extensive report on this matter. Briefly, however, if we delay the development and deployment of the latest technologies, they will be developed by other countries. In fact, the Japanese have developed an aggressive program to develop the technology and finance its deployment at home by selling it to other countries, most notably the United States. The U.S. will lose jobs, fall behind as the world leader in communications, and be required to modify its products to the standards as set by the foreign countries.

Yes, delay would inhibit the development of products and services downstream, assuming we want them to be developed in this country. If the other countries are first to develop and deploy the technology, it is fairly certain that they would be first to develop other products and services downstream. We need to encourage development of technology at home, and free the entrepreneurial spirit of American businesses to create products and services using that technology at home. Otherwise, we will lose our leadership role in communications as we have in other major industries.

ATTACHMENT TO THE TESTIMONY
OF

KENT. B. FOSTER
APRIL 4, 1990

INTERNATIONAL BROADBAND NETWORK DEPLOYMENT:

A COMPARATIVE DISCUSSION

There has been a recognition abroad of the contribution telecommunications makes to economic competitiveness at both the firm and national level. This realization has brought about regulatory reform and other forms of governmental encouragement resulting in an accelerated modernization of telecommunications networks as various countries prepare themselves to be vigorous participants and competitors in the information age. While initially the unequivocal leader, the U.S. domestic telecommunications environment has, in a relative sense, stagnated under a legal and regulatory structure that is biased against aggressive network investment and modernization. At the same time, Europe and the Far East are moving ahead.

Foreign deployment of fiber optic facilities is proceeding at an aggressive pace, not only in terms of fiber backbone or trunking facilities, but with the extension of fiber into the subscriber local loop. West Germany will place nearly 500,000 fiber miles by the end of 1990 (1), and over two-thirds of all fiber placed is in the local loop (2). The French are not far behind, deploying a fiber network extending over 260,000 miles by the year 2000; fiber to the home is already in commercial service in eight cities (3).

The rest of Europe is keeping pace with the front-runners, as smaller nations such as Austria, Switzerland and Italy invest billions of dollars into their telecommunications infrastructure. In 1989, Italy was second only to West Germany in telecommunications investment, surpassing France and the United Kingdom; a 15% growth rate is expected for 1990 bringing Italy's telecommunications investment to $6.7 billion (4).

The European community is working toward transforming itself into an integrated single market by 1992. A state of the art telecommunications infrastructure is the foundation for what is viewed as their "Economic Last Stand". To that end, an integrated broadband network spanning the continent is the objective for the period 1995 - 2000 (5). More immediate, however, 40 new projects involving fiber-based broadband networks are ongoing (6). The European telecommunications market has great economic potential in its own right. Projections indicate that in 20 years this market will expand to between $548 billion to $1.09 trillion, or from 2% of current European gross domestic product to in excess of 7% (7). Current dollar estimates for telecommunications equipment and services markets are $40 billion and $143 billion, respectively (8).

British Telecom (BT) has assumed a leadership role in the modernization of the European telecommunications infrastructure and is aggressively working to achieve its goal of being the most successful worldwide telecommunications group (9). British Telecom's current investments of $4.8 billion are targeted toward increasing the penetration of fiber optic facilities into the subscriber local loop (10). Over two-thirds of BT's long distance network is fiber today, while all of Mercury's network, its competitor, is fiber (11). This extensive deployment of fiber facilities has lowered the unit cost of fiber (12), making it the transmission medium of choice.

Local loop fiber is being used for the provision of CATV and interactive services. The British Government has concluded that the best chance for the development of the U.K.'s fledgling CATV industry is the integrated delivery of TV and telecommunications (13). Currently, however, regulatory restrictions prohibit the telephone company from transporting TV programming over the telecommunications network (14). Recognizing the stifling effect this has had on competition and development of the industry overall, a British policy authorizing the joint provision of services under a single franchise is now under consideration. In the meantime, BT is deploying and testing a fiber optical communications network to 1,000 homes and businesses for the joint delivery of voice, video, television and hi-fi radio services (15).

At the present time, BT's primary local loop fiber application is its "Flexible Access" system enabling subscribers to accommodate their peak demand by switching voice and data usage on individual circuits (16). This application presently accounts for over 7% of the total fiber deployed nationally, and with the recent additional investment of $400 million in this area alone, Flexible Access will be extended to an additional 500 sites including London and major provincial cities by 1995 (17). The continued deployment of fiber in these applications has improved the economics for placing a greater percentage of local loop fiber in small subscriber installations (18). The midcourse projections for BT's aggressive plans will see 10% of total local loop lines fiberized by the mid-1990's (19) -- U.S. local loop fiber deployment is not anticipated to reach this level until 2005 under current circumstances (20).

While Europe is clearly in the lead in the pervasive deployment of fiber in the telecommunications network, Asia, led by Japan and Singapore, are closing in quickly. Acting on the urgent need to ensure their economic strength and vitality, both Japan and Singapore have launched bold national programs to develop and deploy the best telecommunications infrastructure in the world; both are well on their way to realizing these goals.

Just 10 years ago, Singapore launched its national program to build the state-of-the-art telecommunications infrastructure and position itself as an international communications hub (21). With Singapore Telecom's aggressive investments totaling $1.5 billion for 1984-89 and an additional $2.1 billion for 1990-95, full Integrated Services Digital Network (ISDN) availability nationwide was completed in one year and over 8000 miles of fiber were placed by year-end 1989 (22). Singapore Telecom's investment per subscriber averaging $230-300 is bettered only by Japan's $270-300 per subscriber. By comparison, the annual investment by local exchange carriers in the U.S. is currently running at about $150 per subscriber (23).

The strategy in Japan goes beyond their objective to improve their national telecommunications network. Japanese network investment is being made with the expectation that it will pay for itself through the manufacture and export of related technology, primarily to the United States (24). It is estimated that by 2015, 30% of Japan's GNP will be linked to this business segment alone (25). The Nippon Telegraph and Telephone Company (NTT) has committed itself to investment exceeding $200 billion over the next 20 years to build the broadband network extending to every Japanese business and home (26). ISDN availability will reach to an additional 1,000 urban areas by 1991 from today's 150 sites (27). The broadband network and associated services will be launched by 1995 (28). With fiber extended to all businesses and homes by 2015 (29), NTT's Information Network System of ISDN-type services to the home and HI-OVIS, a video transmission system, will become more pervasive (30). Purchases of fiber optics for the public communications network increased more than 20% alone in 1989 (31), with further growth expected consistent with NTT's network commitments.

Asian network modernization is not isolated to Singapore and Japan. The Korean Telecommunications Authority begins privatization in 1990 with $2.2 billion for network modernization, including construction and operation of a CATV network (32).

The U.S. telecommunications industry is not keeping pace in the development of the broadband telecommunications infrastructure spanning the continents. Today's restrictive regulatory environment has not encouraged American telephone company investment in ventures exploring the integrated delivery of voice, data, and video services at home, but pursuit of such ventures has occurred abroad because of the more favorable legal and regulatory climate there. Domestic fiber deployment, while growing, is not moving forward to provide subscribers with local fiber loops except in isolated special trial projects (33).

The North American share of the world's fiber deployment has declined from 50% in 1988 to 44% in 1989, while the share of those at the forefront of the fiber race, namely Japan and Western Europe, continues to grow (34). Fiber deployment in the local loop is not projected to occur in the U.S. at the same accelerated pace as in foreign markets. For the domestic telephone industry, based on current projections, 10% of local loop lines will be fiber in 15 years; it will take 25 years to achieve 50% fiber deployment and full fiber conversion of local loop lines will take 35 to 40 years to accomplish (35). This is a much slower penetration rate than for many other industrialized countries. Domestic local exchange carrier construction budgets have seen little or no growth in the past three years (36).

INTERNATIONAL BROADBAND NETWORK DEPLOYMENT:

A COMPARATIVE DISCUSSION

BIBLIOGRAPHY

(1) 1989 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1989, pp. 27-37.

(2) 1990 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1990, pp. 33-38.

(3) Id.

(4) Telephony, "New Markets Developing," January 22, 1990, pp. 34-67.

(5) Business Week, "Should the U.S. Free the Baby Bells?," March 12, 1990, Vol. 2, No. 464, pp. 118-125.

(6) 1990 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1990, pp. 33-38.

(7) Telephony, "Approaching 1992: France Telecom Expands Internationally to Prepare for a Single European Market," July 24, 1989, pp. 30-32.

(8) Id.

(9) Telephony, "New Markets Developing," January 22, 1990, pp. 34-67.

(10) Id.

(11) 1990 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1990, pp. 33-38.

(12) Telephony, "Big Business Drives U.K. Local Fiber," August 28, 1989, pp. 28-32.

(13) Id.

(14) Id.

(15) 1990 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1990, pp. 33-38.

(16) Telephony, "Big Business Drives U.K. Local Fiber," August 28, 1989, pp. 28-32.

(17) Id.

(18) Id.

(19) Id.

(20) 1989 Telephone Industry Directory, "Timeframes for Fiber to the Home," 3rd Ed., pp. 259-262.

(21) Gateway Management Issues, Coopers & Lybrand, Vol. 5, No. 1, 1990, pp. 3-5.

(22) Telephony, "New Markets Developing: Comments," January 22, 1990, p. 61.

(23) Business Week, "Should the U.S. Free the Baby Bells?," March 12, 1990, Vol. 2, No. 464, pp. 118-125.

(24) Competitiveness & Telecommunications, "America's Economic Future: The House to House Digital Fiber Optic Network," Keyworth and Abel, Hudson Institute, 1990.

(25) Id.

(26) Business Week, March 12, 1990, pp. 118-125.

(27) Id.

(28) Id.

(29) Id.

(30) 1989 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1989, pp. 27-37.

(31) 1990 U.S. Industrial Outlook: Communications Equipment, U.S. Department of Commerce, January 1990, pp. 33-38.

(32) Telephony, "New Markets Developing," January 22, 1990, p. 48.

(33) FCC 1989 Fiber Deployment Update, Common Carrier Bureau, February 28, 1990.

(34) Lightwave, March 1990.

(35) 1989 Telephone Industry Directory, "Timeframes for Fiber to the Home," 3rd Ed., pp. 259-262.

(36) Telephone Engineering and Management, January 15, 1990.

Senator INOUYE. May I now call on Mr. Gillett.

STATEMENT OF THOMAS F. GILLETT, VICE PRESIDENT, CABLE TELEVISION LABORATORIES, INC.

Mr. GILLETT. Good morning. I am Thomas Gillett. I am the Vice President of Business Development and Technology Transfer for Cable Television Laboratories. CableLabs is responsible for research and development on behalf of the cable industry in such areas as fiber optics, high definition and advanced television, consumer interface, systems engineering and network planning.

Prior to my one year of CableLabs experience, I have 19 years of telephone experience, nine with GTE, where among other things I conceived, planned, executed and ran GTE's Cerritos experiment, and ten years with the Bell System. I am a market-driven customer oriented network planner with a keen interest in the operational and market potential of advanced technologies. In these oral comments I would like to emphasize two points: One, what is the appropriate use of fiber optics technology and, two, why telco is so aggressively pursuing an inappropriate use of fiber.

Fiber optics has been shown by many industries as having a significant value when used. It ties together large capacity network nodes.

I would emphasize that fiber optics is not a technology that is unique to the telephone industry. Indeed the cable industry is actively deploying fiber throughout its network. Such utilization is cost-effective and improves the quality of transmission.

However, forcing that technology today and for the foreseeable future to the curb or to the home results in inflated costs and reduced reliability. More importantly fiber to the home does nothing to improve our country's ability to have information services. We do not need any more fiber in order to offer educational, shop at home, medical imaging, home banking or video tech services.

Any information age service can be delivered through either the telephone company's existing network or cable's existing network or a combination of both. Utilizing our existing telco and cable infrastructures can result in any home anywhere in America receiving any information service in a user-friendly, affordable way, and satellites can provide yet another distribution infrastructure. The information age need not be held hostage waiting for fiber to the home.

If fiber to the home for either voice or data is both unneeded and too costly, then why are the telcos so aggressively pursuing the strategy? A simplistic business answer is that they forecast that their core business, voice and data, has minimal growth, and they fear a declining rate base as shown in Bell South's current depreciation filings, fiber to the home will significantly increase their capital spending and thus their rate base, a move in my opinion that is wholly unnecessary since this added cost brings no new value to the customer.

In fact, Bell South has requested through their depreciation filings to shorten by ten years the life of their existing telephone plant so that they can provide broadband services. In other words, they are seeking to have all of their existing telephone rate payers fund their deployment of a broadband network. They want these increased consumer costs to begin now even though their own Bellcore forecasts indicate that by the year 2000 only 5 percent of their customers will be utilizing Bell South's broadband services. In short, they want all of their customers to pay into Bell South's bank so that one in 20 of their customers ten years from now might benefit.

Our country needs information services now that are affordable and for everyone. Telco's fiber to the home plans will not achieve that. Their inflated rate based, high cost approach can at best serve only the rich and will put our country at a competitive disadvantage in the international marketplace. Besides their own technical solution, I believe that telco's video business intention should also be questioned.

The home entertainment video market is currently a highly competitive one. Customers have several suppliers to choose from. There is over the air, home video, cable and satellite, and the average cable network today of 35 channels which already offers a viewer over 1,000 programming choices per day.

Telco, however, does not intend to add to that competitive environment, but to eliminate it. For example, it is the stated view of Southern Bell, made in official filings before state public utility commissions, that their fiber to the home video on demand networks will drastically reduce or eliminate home video stores, movie theaters, and cable networks. It is thus Southern Bell's vision to reduce the customer's video choices.

In GTE's brochure entitled "GTE and Video Services" they state after describing what might be available on a television of the future the following: "Now, imagine that all these services were brought to you by a single company." Single company is in bold print in GTE's brochure. "A company that offered telephone, data and video transmission over the same network to your home with one bill to pay. That is the vision GTE has for the union of telecommunications and video services."

GTE's and Southern Bell's public documents clearly show that it is the intent of at least those two telcos not to act as competitive alternatives, but to eliminate existing video suppliers. Cable is installing fiber to improve the signal quality and programming choices available on its networks. Satellite options are improving, and home video is improving via items such as surround sound and laser disks. Therefore, because the telco's fiber to the home networks are so costly and not user-friendly, it is my belief that the telcos will have at best only a very limited success in the video marketplace.

Thus, as Mr. Verveer will explain, the telco's inevitable use of regulated telephone funds to build video networks will cause an inflated rate base that will be a cost burden on POTS customers.

For the information age, one of the first steps should be to complete diverse, cost effective national fiber backbone networks to tie together all major network nodes. Easy access by any user (residential, business, government) to the power of national fiber backbone networks will quickly and cost effectively allow American to achieve such desirable goals as improving education and increasing anyone's access to information. Let's continue to use fiber where it has value. But to do this, we do not need to take fiber to the home—we can use it practically, and cost effectively, in telco and cable backbones.

Because the characteristics of voice and video traffic are so different, each requires its own optimized network solution. Telco and Cable networks, working independently for some services and dependently for others, are the perfect mediums for cost effectively delivering any service to or from any home. The synergism among independently optimized networks is the best path to making the information age available soon and cost effectively to every home in America.

Other networks might also share in this information age synergism. Satellite systems are excellent tools now and for the future in helping to deliver services such as education or medical imaging.

In closing I would like to emphasize two points. One is to say that I believe the challenge for all of us is to serve America, not to technology her. Telcos have over the years made many residential services promises based on either ISDN or gateway technologies. They should be encouraged and directed if necessary to concentrate on delivering those services promises now.

Fiber is one of the technological tools that plays a role in helping to better service America, but it is not the panacea espoused by some and, in fact, its misuse such as fiber to the home would be a costly detriment to our country's future.

And the second point is about cable's commitment to R&D. I was attracted to the cable industry and CableLabs because of its commitment to research into such areas as fiber optics, high quality networks, improved, enhanced and high definition television and working towards offering in a user-friendly way thousands of programming choices per day to our customers.

The post-1984 cable act environment encourages in our industry entrepreneurial R&D actions. I fear that a move to reregulation may dampen the market value of such R&D. Thank you very much.

[The questions and answers follow:]

Thomas Gillett and Philip Verveer's Response to Senator Kerry's Questions April 4, 1990 Hearing

1. Does not the creation of a fiber optic network constitute an alternative to the existing coax network? Would not this new network serve as another competitive check on any monopolistic tendencies of the cable companies?

Without commenting on the fairness of the characterization of "monopolistic tendencies" on the part of cable companies, the deployment of fiber optic facilities by telephone companies could provide yet another medium through which consumers could receive video services. It is critical to recognize, however, that there is nothing in the existing legal arrangements which prevents telco deployment of fiber; telephone companies have always been free to construct and provide various transmission modes (subject, of course, to traditional utility oversight by the FCC and the states). Whether telephone company-owned fiber could provide _efficient and fair_ competition to cable television operators and other video distribution providers will be determined largely by the formulation and enforcement of effective regulation to ensure, for example, that telephone ratepayers are not forced to pay for transmission capability that they neither want nor use.

With regard to an all-fiber network, "fiber to the home" offers consumers no new services. Moreover, the delivery medium will be transparent to the viewer: there is no visual difference between a movie that is delivered over fiber and one transmitted over coax or a hybrid system. An all-fiber network would have merit only if it offered subscribers lower bills. However, it is impossible now or in the foreseeable future to build such a network at a lower price than a coaxial or hybrid video network without cross-subsidies. As such, an all-fiber network would be both inefficient and harmful to the consumer since he or she would be paying more for the same services.

2. Would the cable companies object to allowing the telcos to provide programming services on some, but not all, of the channels on a broadband network? If so, why?

The cable industry -- along with the support of various governmental authorities -- has opposed telco involvement in _any_ programming services. The proposal initiated by some telephone company advocates to permit telco control of some channels on a telco-owned cable system is a compromise without reason. It would give the telcos incentives to discriminate not only against independent television media but also against non-affiliated programmers seeking access to the "common carrier" portion of the telco systems. The incentives to disadvantage competitors are a direct function of cost-of-service regulation to which telephone utilities are subject, making vertical integration by such companies uniquely troublesome and inefficient. For this reason, existing law appropriately requires telephone company activity to be restricted to providing capability to all programmers under tariff.

3. What are the international competitive consequences of delaying the development of fiber optic networks? Would delay inhibit the development of products or services downstream?

Fiber optic facilities -- like any other technology -- should not be artificially delayed. But it is equally important that no one technology be artificially promoted. Unwise governmental policies that would have either of these effects would make U.S. telecommunications less efficient and ultimately less competitive in global markets. If fiber optics is prematurely deployed through ratepayer subsidies, the development of products and services that depend upon the use of efficiently priced transmission capability will most surely suffer. More directly, telco involvement in the downstream markets -- which will inevitably distort competition in these markets -- will have a severely negative effect upon U.S. competitiveness and will benefit only the telephone companies, not the national good. We already have the communications infrastructure necessary to provide all of the services envisioned in the "Information Age." What we need to do is develop those services as demand warrants. We note that the telephone companies have declined to deploy many of these services even though they possess the legal and technical ability to do so.

Senator **INOUYE**. Thank you, sir.
Mr. Verveer.

STATEMENT OF PHILIP L. VERVEER, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. **VERVEER**. Good morning, Mr. Chairman and members of the subcommittee. My name is Phil Verveer. I am grateful for the opportunity to appear before you on behalf of the National Cable Television Association.

The telephone industry has been beset by competitive controversy for its entire history. Should proposals to give the local telephone companies an expanded role in the television business be adopted, the almost certain consequence will be a return to disputes as broad and bitter as those which led to the Bell System divestiture. The result will be bad for telephone ratepayers, for television viewers and for the broader political and cultural life of our society. What is at stake here, what we are trying to protect, is the growth and dynamism of the television business in all of its dimensions.

And, in fact, the principle extends much further. That is why the subcommittee has heard from such interests as the National Association of Broadcasters, when Mr. Fritts last week suggested that his industry did not want to see the telephone business in the content business, from the American Newspaper Publishers Association who I understand have written to the members of the Senate on the same issue, from the Consumer Federation of America and Consumers Union in the letter that you, Mr. Chairman, have introduced into the record last week.

All of these interests and many others as well feel this concern about telephone company integration into the content business.

Now, why are serious competitive controversies unavoidable if telephone companies are assigned a broader role? There is no great mystery here. It is a simple result of the normal economic incentive to maximize profits, distorted in highly predictable ways, ironically enough, by the application of public regulation.

The explanation for the protracted history of competitive problems in telephony thus is entirely independent of personality. It simply recognizes the behavioral distortions produced by the combination of cost of service regulation and local telephone companies' continuing monopoly over the means of local electronic distribution.

This combination provides local exchange companies with both the economic incentive and the ability to disadvantage competitors. Rate based regulation gives regulated firms the incentives to misallocate costs and discriminate in the provision of service to others.

How does this work? The key is found in the telephone rate regulatory formula which has prevailed through many decades. A simple version of that formula is set out on page 2 of my submitted testimony. And I submit, Senators, that the application of that formula, that arrangement, something that has prevailed for the better part of a century with respect to telephony is the thing that makes all the difference in the world with respect to proposals to permit telephone companies to integrate, not only into television, but into other forms of content.

Regulation prevents local telephone companies from fully exploiting the economic value of their monopolies by limiting their profits. This leads to unusual incentives to integrate into adjacent markets. If allowed into competitive markets, telephone companies can maximize overall profits by misallocating costs attributable to competitive business to regulated services, by manipulating intracorporate transfer prices and by discriminating against competitors.

Now, normally we rely upon competition to secure consumer welfare, as Mr. Hunt testified earlier this morning. Over the last 20 years or so the traditional economic regulatory agencies, the FCC very prominently among them, has promoted competition as a means of securing consumer welfare.

But at the very same time this has gone on, the government in all of its branches has recognized that cost of service regulated monopolies represent a special case, one where the normal policy prescriptions do not apply. The competitive problems posed by such firms have not yielded to countervailing behavioral regulatory requirements.

After a great deal of effort with lesser regulatory measures, the FCC in 1970 decided that the only solution was to ban telephone companies from offering video programming in their telephone franchise areas. This determination applied to the rest of the local telephone industry a similar determination that was applied to the Bell companies in a 1956 government antitrust consent decree. It mirrors equivalent geographic cross-ownership prohibitions imposed on other communications services by the FCC.

The 1970 constraint was renewed as to the Bell companies in the 1982 AT&T consent decree, and it was renewed as to all local exchange companies by Congress in 1984.

A lot of misinformation has circulated as to the scope and thus the cost to consumers of the ban on telco provision of cable. Local telephone companies argue that the restrictions prevent video distribution competition and/or that they prohibit the availability of new technologies such as fiber optics to consumers.

There is a tendency in telephone company advocacy to say, "We have to get rid of the cable cross-ownership rule; let's talk about fiber optics," leaving it to the listener to draw the connection between the two. But the truth is that the local companies are free to deploy fiber or any other distribution technology. What they are not allowed to do is provide content or other functions which cross the carrier-user line. Mr. Collins in his testimony referred to the desirability of permitting telephone companies to provide certain ancillary functions. As it turns out, the FCC presides over an arrangement that permits it to ascertain, to determine from time to time what is an appropriate carrier function and how that carrier function ought to be regulated. That is, the present arrangements, I think, really do not inhibit the kinds of ancillary functions nearly so much as some might believe.

There have been no changes in the competitive or regulatory environment since October 1984 when the Cable Act restrictions on telephone entry were enacted that would warrant removal of the cross-ownership restrictions. Although there has been a lot of talk about new safeguards, there is little basis for believing that behavioral regulatory solutions can be effective. It bears emphasis that today's so-called new safeguards are really not significantly different from that those failed miserably in the 1960s and 1970s.

I would be pleased to answer any questions you may have.

[The statement follows:]

STATEMENT OF PHILIP L. VERVER, ON BEHALF OF NATIONAL CABLE TELEVISION ASSN.

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Philip L. Verveer. I am a member of the law firm of Willkie Farr & Gallagher. I am grateful for the opportunity to appear before you on behalf of the National Cable Television Association, the principal trade association for the cable industry.

The telephone industry has been beset by competitive controversy for its entire history. Should proposals to give local telephone companies an expanded role in the television business be adopted, the almost certain consequence will be a return to disputes as broad and bitter as those which led to the Bell System divestiture. The result will be bad for telephone ratepayers, television viewers, and the broader political and cultural life of our society. What is at stake here -- what we are trying to protect -- is the growth and dynamism of the television business in all of its dimensions.

I would like to describe why serious competitive problems are unavoidable if telephone companies are assigned a broader role. There is no great mystery here. It is a simple result of the normal economic incentive to maximize profits -- distorted in highly predictable ways, ironically enough, by the application of public regulation.

The explanation for the protracted history of competitive problems in telephony thus is entirely independent of personality. It simply recognizes the behavioral distortions produced by the combination of the type of regulation to which local telephone companies are subject and their continuing monopoly over the means of local electronic distribution. This combination provides local exchange ompanies with both an economic incentive and the ability to disadvantage competitors.

Rate base regulation gives regulated firms the incentive to misallocate costs and discriminate in the provision of service to others. How does this work? The key is found in the telephone rate regulatory formula which has prevailed for decades. A simple rendering is $R=E+(V-d)r$.[1]

Regulation prevents local telephone companies from fully exploiting the economic value of their monopolies by limiting their profits. When it is effective, the very nature of traditional public utility regulation prevents them from earning monopoly profits in the market -- local distribution -- where they have power. As a result, their rational economic incentive to evade these constraints, to fully recognize the value of their monopolies, leads to efforts to exploit their power in other markets. Regulatory evasion creates a constant and systematic bias toward diversification into adjacent markets and a constant danger of unfair competition in these markets. Put simply, local exchange companies have every incentive to leverage their governmentally sanctioned monopolies -- monopolies which they've strenuously sought to protect through legal barriers -- into competitive markets. Competitors who depend upon telephone monopoly facilities and services in order to provide their own services are most especially vulnerable to this leveraging. Electronic publishers, and cable operators specifically, are classic examples of firms which are dependent upon telephone company "essential facilities."

---

[1] Where R = revenue requirement, or allowable earnings; E = expenses; V = gross facilities investment; d = depreciation; and r = allowed rate of return, or cost of capital.

Cost-of-service regulation induces the regulated monopolist to maximize its profits in an unusual way. The monopoly local exchange provider has an increased incentive to integrate into unregulated markets through which it can realize otherwise impermissible profits. If allowed into competitive markets, the monopolist can maximize its overall profits by misallocating costs attributable to the competitive business to the regulated services and thus increasing the rate base, by manipulating intracorporate transfer prices and by discriminating against its competitors, thereby raising their costs or foreclosing them altogether.

Normally, we rely upon competition to secure consumer welfare. Over the last 20 years or so, the traditional economic regulatory agencies -- the FCC prominent among them -- have promoted competition by opening many services to new entry and by attacking private and governmental restrictions on output. But at the very same time, the government in all of its branches has recognized that cost-of-service regulated monopolies represent a special case -- one where the normal policy prescriptions do not apply.

The competitive problems posed by such firms have not yielded to countervailing behavioral regulatory requirements. After a great deal of effort with lesser regulatory meansures,[2] the FCC in 1970 decided that the only solution was to ban telephone companies from offering video programming in their telephone franchise areas.[3] This determination applied to the rest of the local telephone industry the constraints applied to the Bell Companies by the 1956 government antitrust decree[4] and mirrors equivalent geographic cross-ownership prohibitions imposed on other communications services by the

---

[2] See e.g., Common Carrier Tariffs for CATV Systems, 4 F.C.C. 2d 257 (1966); Gen. Tel. of Calif., 13 F.C.C. 2d 448 (1968), aff'd. 413 F. 2d 390 (D.C. Cir.), cert. denied 396 U.S. 888 (1969); Better TV, Inc. of Dutchess County, 31 F.C.C. 2d 939 (1971), recons. denied 34 F.C.C. 2d 142 (1972).

[3] Final Report and Order, 21 F.C.C. 2d 307, recons. in part, 22 F.C.C. 2d 746 (1970), aff'd. sub nom. Gen. Tel. Co. of the Southwest v. U.S., 449 F. 2d 846 (5th Cir. 1971).

[4] United States v. Western Electric Co., 1956 Trade Case ¶ 68,246 (D.N.J. 1956).

FCC.[5] The constraint was renewed as to the Bell Companies in 1982 in the AT&T divestiture decree[6] and as to all of the local exchange telephone industry by Congress in 1984.[7]

The restriction on entry into video programming thus promotes consumer welfare. A lot of misinformation has circulated as to the scope -- and thus the cost to consumers -- of the ban on telco provision of cable. Local telephone companies argue that the restrictions prevent video distribution competition and/or that they prohibit the availability of new technologies, such as fiber optics, to consumers. There is a tendency in telephone company advocacy to say, "We have to get rid of the cable cross-ownership rule; let's talk about fiber optics," leaving the listener to draw a connection between the two. But the truth is that the local companies are free to deploy fiber, or any other distribution technology. They are also free to provide video transport, construction, and maintenance services, such as Pacific Bell provides in Palo Alto and C&P provides here in the District of Columbia.

---

[5] See, e.g., Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations (broadcast/newspaper cross-ownership), 50 F.C.C. 2d 1046; recons. 53 F.C.C. 2d 589, aff'd. sub nom. F.C.C. v. Nat'l. Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

[6] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[7] Section 613(b) of the Cable Communications Policy Act of 1984, codified as 47 U.S.C. § 533(b).

What they are not allowed to do is to provide content or other functions which cross the "carrier-user" line. There have been no changes in the competitive or regulatory environment since October, 1984, when the Cable Act restrictions on telephone entry were enacted, that would warrant removal of the cross-ownership restrictions. Although there is a lot of talk about "new" safeguards, there is little basis for believing that behavioral regulatory solutions can be effective. It bears emphasis that today's so-called new safeguards are really not significantly different from those that failed miserably in the 1960s and 1970s. And as the Justice Department explained during the AT&T consent decree Tunney Act proceedings:

> At the heart of the government's case in United States v. AT&T was the failure of regulation to safeguard competition in the face of the powerful incentives and abilities of a firm engaged in the provision of both regulated monopoly and competitive services . . . . Neither of these problems (of discrimination and cross-subsidization) has thus far proven amenable to successful regulatory solution . . . . Thus, permitting BOC entry into competitive markets would undermine the rationale of divestiture . . . .[8]

---

[8] Response of the United States, 47 Fed. Reg. 23,320, 23,336 (1982).

Only if and when local exchange companies lose their monopoly in local distribution or circumstances otherwise dramatically change, will it be appropriate to consider modifying the cross-ownership ban. In the meantime, the prohibition provides the only effective way of protecting the dynamism of video services in the United States.

I would be pleased to answer any questions you may have.

Senator INOUYE. Thank you very much, Mr. Verveer.

Now, may I call on Mr. McLaughlin.

STATEMENT OF JOHN F. McLAUGHLIN, EXECUTIVE DIRECTOR, PROGRAM ON INFORMATION RESOURCES POLICY, HARVARD UNIVERSITY

Mr. McLAUGHLIN. Thank you, Mr. Chairman. I am pleased to be here today.

You are confronted with some very interesting challenges. And I am not here to tell you what to do, because the research program I represent is in the business of avoiding telling people what to do. We simply try to tell people what is going on in the world. There is no Harvard solution to any of the problems you are confronted with.

You have my submitted testimony, so I will drop a lot of that to try to address a few points, and perhaps more informally than the testimony would allow.

The issue here today is on the table because both of the industries represented started as regulated monopolies, with very different regulatory schemes. Neither represents the epitome of competition. So whether or not either actually knows how to operate in a competitive environment, I think is an open question.

I point out sometimes that I spent 12 years at the headquarters of the Post Office and Postal Service and therefore I know what a monopoly is like. It made it very easy to transfer over into the telecommunications world. We thought a lot alike on a lot of issues.

Now I am not going to directly address the bill today; I am responding to your staff's suggestion that I might address the broader question of infrastructure. And we get into the infrastructure question, I think, simply because normal economics seem to fail here.

Whenever anyone mentions infrastructure, I have a tendency to reach for my wallet. When I hear truckers talking about how we need to rebuild the highways of America, I have this tendency to think that perhaps someone wants me to pay for something they want.

Now, there is a legitimate role for infrastructure, and we can talk about that during questions if you like. But I would like to make the point that we are talking about infrastructure because I do not think the market is working here. And I guess my puzzlement, as I have told many people from the telephone industry, is why do they want to get into the business of providing fiber to the home?

The numbers are terrible. Let me point out that in 1988, the entire cable service operator industry had revenues of $13.4 billion. That $13.4 billion represents the income from pay and basic subscriptions, from home sales commissions, installation fees. That $13.4 billion is the whole bundle.

And $13.4 billion sounds like a lot of money to some of us, but if you are talking about the United States telephone industry, it ain't very much money.

Moreover, if you assume that the telephone industry would have to go out and invest anywhere from $150 billion to $450 billion to compete for a piece of that $13.4 billion, you have to wonder about the economics of it. No rational person that I know of would go out and invest $150 billion to try to scarf up a $13.4 billion market, and especially if they had to compete with a cable industry that already has 85 percent of the country wired.

I am here to tell you that the cable industry would respond by price cuts, which would mean both would be bleeding.

Now, for 25 years or more, I have been reading and hearing technologists forecast all of the great services which would be created by the electronic highway to the home. The list is familiar: interactive educational services, home shopping, home banking, electronic mail, telemetering, and that all-time favorite, videotext.

During this same period, dozens of companies have lost hundreds of millions of dollars proving that there is not much demand for those services.

Moreover, even if there were a significant demand, the current networks of twisted pair, cable, and broadcast seem quite adequate to the bandwidths required.

So if I look at the fiber to the home infrastructure question as a market issue, I say, it is a non-issue, it is a non-winner, it is a non-starter. Reasonable people making investments with their own money would not rush out to glass over America by putting fiber to the home or to the curb.

Now, that is from simple economic analysis. On the other hand, we all know that infrastructure is not a matter of simple economic analysis. I guess if you talk to infrastructure buffs, you would learn that much of what gets labeled as infrastructure is supposed to defy the simple bean counting financial analysts.

For many people, infrastructure entails a vision of the future, a great leap forward, guided by the same kind of messianic self-confidence that drives private entrepreneurs to spectacular successes, or to equally spectacular failures.

It is worth noting, however, that when people are exercising their messianic vision under the infrastructure cloak, we the public are the ones who pay for the failures.

Now, just in passing, then, I would like to move on to what is now, these days, considered the great infrastructure project of the 20th century in America, the Interstate Highway Program. Most people seem to think that this was a good program. There are two aspects of it, however, which may shed some light on the current issue.

First, we should recognize that much of today's interstate highway structure would have been built without the federal program. Many of the most critical and heavily travelled routes were built as toll roads before the federal program started.

The program also led to some wasteful overbuilding, relative to traffic demands, particularly in rural areas. Thus, as always happens when we try to second-guess the market, we did misallocate some of our wealth.

Second, we should recognize that there was a very real downside to the highway program. Most urban sociologists have argued for years that the interstate program did much to destroy the center city of most metropolitan areas. It certainly contributed to the "malling" of America, and the demise of the commercial centers of many small towns.

It was the coup de grace for passenger railway service, and eliminated much of the rail freight business.

In sum, it may have been the ultimate infrastructure program, but it certainly was not an unmixed blessing for the country.

These same two problems exist when we look at proposals for "information age infrastructure." First, an awful lot of "information age infrastructure" already exists, perhaps as much as anyone can justify.

If you are Citicorp, Sears or General Motors, it is unlikely that you are hurting for infrastructure. As a consumer, I have 76 channels available on my TV today, and the local New England telephone company switch provides flawless service for my 2400 baud modem in communicating to my office.

Anyone suggesting the need for some kind of massive investment in "information age infrastructure" probably should be required to be pretty specific about what the program will produce, compared to what the economy is producing on its own.

Second, government-directed or government-guided investment in new information infrastructure will, like the interstate program, produce losers as well as winners. The obvious losers at this stage would appear to be the CATV companies and their stockholders. But, as I suggested earlier, this may not be a gift for the telephone industry either.

I know that I am not an accomplished enough fortuneteller to foresee all the other possible losers.

Now, as I said before, we do not tell people what to do, and we are convinced we do not have the Harvard solution to this, or any other problem. We do advise a certain Hippocratic approach or "First, do no harm."

If fiber to the home is going to be the next interstate highway-type infrastructure program launched by the Federal Government, I would like you to think about who the new truckers and suburban developers are, and who constitutes the information age counterparts of the losers: the central cities, small towns, and railroads.

Thanks for your attention.

[The statement follows:]

STATEMENT OF JOHN F. McLAUGHLIN
EXECUTIVE DIRECTOR
PROGRAM ON INFORMATION RESOURCES POLICY
HARVARD UNIVERSITY

April 4, 1990

Thank you, Mr. Chairman, and thanks to the other Members for inviting me to speak today. I am pleased to have the opportunity to comment on a set of challenging issues.

Please note that I am testifying in a personal capacity, not as a representative of Harvard University, or any of our supporters.

As background let me state that I was a career civil servant at the Federal Aviation Agency from 1961 to 1964, and at the headquarters of the Post Office Department and the US Postal Service from 1964 to 1977. For the past thirteen years I have been an executive director of Harvard University's Program on Information Resources Policy.

Our Program was founded in 1972 to conduct research on issues of information technology and public policy. We aspire to provide competent and impartial research findings to all participants in the information policy field. Among the many devices we have developed to maintain both the reality and appearance of impartiality is the mechanism we use for funding our research; we collect annual "hands-off" contributions from scores of companies and government agencies, both foreign and domestic, who have conflicting and competing interests and policy views. A list of our supporters is appended to my written testimony.

In accordance with our Program's policy of not taking-sides, I am not here today to speak for or against the current draft bill. Instead, at the request of the your staff, I would like to address the wider issue of "information age infrastructure," which has been raised both in connection with this bill and related telecommunications legislation.

I would like to discuss three points today. The first concerns the nature of infrastructure. The second concerns the market for fiber-to-the-home infrastructure. The third involves what I will describe as the "downside" of infrastructure.

I looked at a multitude of definitions for the term "infrastructure" when preparing this statement. At the risk of sounding cynical, I have concluded that much of what gets labeled as infrastructure in the public policy arena is stuff that some people want, but are unwilling to pay for directly. Thus, when I hear truckers talking about the "need to rebuild our national transportation infrastructure," I tighten my grasp on my wallet:

"infrastructure" normally means someone wants me to pay for his or her benefit. Given the way that people use the term nowadays, there is a real risk that "infrastructure" and "boondoggle" may become synonyms.

That would be a shame. I think most economists can agree that there is something real in the idea of infrastructure. I would suggest, however, that most of what is real in infrastructure is encapsulated in the idea of "public goods," or those things we buy as a government or social collective, which we could not afford to buy on our own. The quintessential example is defense, whether on the macro-scale, as with DOD, or on the smaller scale of community police. Most voters can argue for more or less defense, but the great majority wants to be protected from pirates, brigands and terrorists.

Perhaps the real test of the "public goods" nature of infrastructure is a willingness of the body politic to pay direct taxes for a given product or service. Most of the public votes for public funding of water and sewer systems, city streets, police and fire services because it is hard to conceptualize and implement better options. It was my experience as a member of the Board of Selectmen in Lexington, Massachusetts, that the more people who benefitted from a service, the more were willing to pay for it. I think that 90 plus percent of Lexington's population was in favor of plowing the snow from our streets.

We also know that the "public goods" approach to infrastructure is less persuasive, and thus less comprehensive, in a multitude of fields including health, education, recreation, and transportation. As a matter of policy, we sometimes go to great lengths in these fields to avoid the monopolies normally implied by the invocation of infrastructure.

Enough background. If someone is going to provide fiber optic highways running to all, or even many, of America's homes in the 1990s, it will have to be done under the infrastructure label. It will require direct government funding, or government-imposed cross-subsidies because there is no discernible market demand to justify such an investment by private financing. The US Government can build an "information age infrastructure," if willing to pay for it -- or to force someone else to do so. Otherwise, information age infrastructure will emerge as determined by marketplace demand.

For twenty-plus years I have been reading and hearing technologists forecast all of the great services which would be created by the electronic highway to the home. The list is familiar: home-shopping, home-banking, electronic mail, interactive educational services, telemetering, and that all time favorite, videotext. During this same period, dozens of companies have lost hundreds of millions of dollars proving that there is not much demand for such services. Moreover, even if there were significant demand for these services, the current networks of twisted-pair, cable and broadcast seem quite adequate to the bandwidths required.

From a market viewpoint, the only residential service demanding significant bandwidth is the delivery of video entertainment. According to most estimates, about 85% of the nation's homes have high bandwidth video delivery available today. It is called CATV. Most of the 15% of homes not served by cable today probably will not be served by cable, or by fiber technologies in the near future, because their geographic dispersion makes most wiring schemes economically unattractive. In addition, close to 100% of homes have broadband video delivery available by broadcast, and two-thirds of all homes have VCRs and access to thousands of video rental stores and libraries. While I am sure that there are households scattered across the country that may be unhappy with their video entertainment options (and prices), on balance, we are not talking about a vastly underserved market. Most Americans have far more video entertainment delivery channels available than they can use.

Investing hundreds of billions of dollars in pushing fiber optics to the home, or to the curb, does little on the video delivery scene but to divide the current market among more participants. As a consumer I might applaud having multiple CATV vendors competing for my patronage, but I would be less enthusiastic if I felt that I was paying the difference in taxes or telephone bills. If I were a telephone company stockholder, I would have great qualms about investing in fiber-to-the-home without seeing some market research and financial pro formas suggesting that I had a favorable opportunity to profit from my investment. Personally, I have never seen, nor been able to construct, such a favorable projection.

Let me reduce some of this debate to fairly simple numbers. In 1988 all of the CATV system operators in the U.S. generated $13.4 billion in revenues from all sources. That $13.4 billion includes basic and pay subscriptions, installation fees, advertising revenues and home shopping commissions. For reasons that I will be happy to explain, this market is not growing as rapidly as you might suspect. Letting the Regional Holding Companies (RHCs) into this market -- encouraging them to spend 150 to 450 billion dollars to match CATV investment -- is hardly a favor to the RHCs or their investors. In any conventional financial analysis, the likely return on investment is terrible.

You may want to let the RHCs in anyhow. The Congress of the United States (or Judge Greene for that matter) does not exist to protect RHC stockholders. The problem, of course, is how to limit the financial risk of such a policy to just RHC stakeholders. Perhaps there is some way of doing this, but if that were the case, we would not be debating the details of financial engineering and standard financial analysis, not infrastructure.

I guess it is fair to say, however, that much of what gets labeled as infrastructure defies the predictable "bean-counting" which guides the marketplace. For many people infrastructure entails a vision of the future, a "great leap forward," guided by the same kind of messianic self-confidence that drives private entrepreneurs to spectacular successes, or to equally spectacular failures. It is worth noting, however, that when people are exercising their messianic vision under the infrastructure cloak, we, the public, are the ones who pay for failures.

(I applaud swashbuckling visionaries risking my money only when I get to make an absolutely free choice of which swashbuckler I want to bet on; even then, I want to see a financial statement first.)

Other examples of infrastructure in American history probably offer little guidance in this instance. As a veteran employee and student of both the Post Office and the FAA, I can testify that the evidence on the role of infrastructure in relation to development of post offices and post roads, publishing, railroads and airlines is mixed and controversial, at best.

To illustrate the problem, let's focus on the infrastructure program that appears to be everyone's favorite example these days, the interstate highway program. Most people, now, seem to think that this was a good program. There are two aspects of the program, however, which may shed some light on the current issue.

First, we should recognize that much of today's interstate highway structure would have been built without the federal program Many of the most critical and heavily traveled routes were built as toll roads before the federal program started. The program also led to some wasteful overbuilding relative to traffic demands, particularly in rural areas. Thus, as always happens when we try to second-guess the market, we did misallocate some of our wealth.

Second, we should recognize that there was a very real downside to the highway program. Most urban sociologists have argued for years that the program did much to destroy the center city of most metropolitan areas. It certainly contributed to the "Malling of America," and the demise of the commercial centers of many small towns. It was the *coup de grace* for passenger railway service, and it eliminated much of the rail freight business. In sum, the interstate highway program may have been the ultimate infrastructure program, but it certainly was not an unmixed blessing for America.

These same two problems exist when we look at proposals for "information age infrastructure." First, an awful lot of "information age infrastructure" already exists, perhaps as much as anyone can justify. If you are CitiCorp, Sears, or General Motors, it is unlikely that you are hurting for infrastructure. As a consumer, I have seventy-six channels available on my TV, and the local New England Telephone Company switch provides flawless service for my 2400 baud modem in communicating to my office. Anyone suggesting the need for some kind of massive investment in "information age infrastructure" probably should be required to be pretty specific about what the program will produce compared to what the market is producing on its own.

Secondly, government-directed, or government-guided, investment in new information infrastructure will, like the interstate program, produce losers as well as winners. The obvious losers at this stage would appear to be the CATV companies and their stockholders, but as I suggested earlier, this may not be a gift for the telephone industry, either. I know that I am not an accomplished enough fortuneteller to forsee all the other possible losers.

My colleagues and I have the policy of not telling people what they should do. We are convinced that we do not have the Harvard solution to this, or any other, problem. We do advise a certain Hippocratic approach, or "First do no harm." If fiber-to-the-home is going to be the next interstate highway-type infrastructure program launched by the federal government, I would like you to think about who the new truckers and suburban developers are, and who constitute the information age counterparts of the "losers": center cities, small towns, and railroads.

Thank you for your attention.

Senator INOUYE. Thank you very much, Mr. McLaughlin.

Senator Exon has advised me that he has a 10:00 scheduled appointment, and so I will yield my time to him.

Senator EXON. Mr. Chairman, thank you very much. I will be very brief. But I will be back as soon as I can.

First, do not read anything into the questions and statements I am going to make, because I generally have not made up my mind, but I am searching for the answer to this problem, gentlemen.

Let me start out by saying I think this committee has been very generous to cable television over the years, and we realize that that was an important part of the communication system, and I think past legislation has been very helpful in establishing the cable networks.

I was a little bit disturbed, I would say, at the cable people, though, during a recent visit to Los Angeles, where I saw a big billboard that had these words on it: "No cable, no Gretzky, no Magic." For those of you who are not sports fans, that was telling the people of the Los Angeles area that if you did not have cable, you were not going to watch Wayne Gretzky, the hockey star, or Magic Johnson, the basketball star.

My advice to you three is that that is terrible public relations. But, for whatever it is worth, that was my reaction to it as an individual that has the honor of serving on this committee.

To the telephone people, I would simply say that I think we have to be awfully careful of the areas into which we move, because I suspect that the telephone people do not want any kind of reregulation. And it seems to me that this whole proposition of fiber optics flirts with the possibility of partial reregulation or more regulation of your industry.

Therein lies the difficulty that I think we all have sitting on this side of the table, while at the same time trying to put on your shoes and sitting down there at that end of the table, to make a firm decision.

With what I said in my opening statement, again, the ultimate concern here is not the cable television people, nor the television people, nor the telephone people. It is the consumer and how we best serve them.

Let me ask this question. The staff draft, as you know, allows telephone companies to provide programming as common carriers. And I assume that you in the telephone industry are not for that. But, assuming that would take place, could that arrangement allow, or would that arrangement allow for what I call a cafeteria-style of selection of programs by the customers?

In other words, if I had that kind of a system in my home, would I be able to order up and pay for only channels that I want, or would I have to buy a package?

Mr. FOSTER. I think it is not sufficient to ensure that you would have a cafeteria of services, because I do not think the infrastructure would be put in place. Because we would have no assurance of the network being used. And that is the problem we have faced over the past 20 years.

We have had the capability, and we have been allowed to build a network, but we cannot find anyone to step up, any cable company to say, okay, we will use your network.

So, theoretically, that network could go into place and could provide the cafeteria services, but, in fact, without the telephone companies being permitted to be one of the content providers, it is unlikely that it would occur.

Senator EXON. Mr. Gillett.

Mr. GILLETT. Two comments. One, a response to Kent's comments, and then I would like to describe where I think cable television is going in response to in fact offering cafeteria services, as you describe it.

One, I have been in on the economics of both developing proposals to cable companies when I was with the telephone company, as well as now on this side, reviewing them as a potential customer of those. And the problem is not trying to protect monopolistic control of programming, it is a simple problem of costs.

You know, the cost structure in a cable network is very low. We now build fiber optic coax networks for a couple hundred dollars per house, and I think you have heard numbers from the telephone companies that do not come anywhere close to that in building the alternatives that they are offering to us.

It is a significant cost difference, usually to the tune of four to 10 times the difference in cost between building our own networks, versus leasing capacity from the telephone company.

Now, on cafeteria-type services. In Boulder, Colorado, which happens to be where CableLabs is located, and TCI has the franchise there, they are experimenting with a new technology that in fact allows us to put devices on the side of the house that permits us to have a much easier way for us to allow customers to choose what they want.

And, in fact, strategically, what we are trying to accomplish is, when you go home and look at your cable system, it ought to feel like your cable system, not TCI's cable system or ATC's cable system. But it ought to be uniquely constructed so you are getting the services that exactly you want, and your neighbor right next to you is getting the services they want, and they feel it is their system.

Strategically, that is where we are going. We have the technology that we think is going to allow us to do that, and we are experimenting with it right now.

Senator EXON. Thank you. I have 32 channels on my cable television at our home in Lincoln, Nebraska, and about 61 or 62 here in the Washington, D.C. area. Two-thirds of those channels, while they might be of interest to other people, and maybe I am over selective, two-thirds I would rather not have in my home.

Senator FORD. None of them has sports on them.

Senator EXON. I am sorry, Senator Ford, that you announced that, because it is well known on the Committee that I only watch things with news or a ball in it.

Mr. Hunt, I do remember something about Kearney, Nebraska. What year was that that you went into competition out there, and how long did it last, in years or months?

Mr. HUNT. It must have been five or six years ago that they came to us. I do not have the date with me, but something like that, and I think we were in business out there for several years.

Senator **Exon**. Thank you. Thank you, Mr. Chairman, for your courtesy. I would yield at this time.

Senator **Inouye**. Before I recognize my senior colleague, Senator Packwood, I would like to note that these hearings have apparently been followed by an avid group of consumers on C-Span and I have been receiving many letters from them suggesting that certain technological words be better defined, because although all of us here may understand what fiber optics is and what a broad-band network is, can any of you just give a simple definition of fiber optics and broad-band network so that the viewers will know what we are talking about?

Mr. **Collins**. Mr. Chairman, I would be happy to. The network that we are talking about would be a high capacity network capable of carrying a broad-band television quality signal.

Senator **Ford**. Try four-letter words, if you would.

Mr. **Collins**. Thank you, Senator Ford. We are talking about making video television-type services available as easily as you make a telephone call today. Maybe that is the simplest thing for the public to consider in thinking about the fiber optic kind of network. That is a technology that underlies a capability.

Senator **Inouye**. What is the difference between fiber optic and copper wire?

Mr. **Collins**. There is a tremendous difference in the capacity of the number of channels and signals—cable television quality signals, number of voice signals, cost of providing those over a fiber network.

Can I—we have been talking about an economic problem here. The accusation is that the fiber network that the telephone company—the technology, the capacity that we want to install is not an economic solution. I would like to set the record straight on it, if you would permit me.

We today are deploying and have been deploying new technologies for years. If you go back not very long ago we had manual systems. We converted them to dial, we took them to electromechanical, we took those kinds of switches to stored program and now we have digital switches.

The result of all of that has been lower cost—larger systems and lower cost of service, basic telephone service, to the consumer. I believe that we are putting fiber into our network in a cost-effective way.

We put fiber in between all the major switching centers here in Washington over the last five years. It has been the economic choice, even for plain old telephone service. It is the economic choice in 1992 for telephone service into new neighborhoods and subdivisions.

We have the experience. We are now talking to suppliers about the price and cost of the new technologies. The numbers that are represented here are incorrect. When we start to buy fiber and digital switches and broad-band switches in the quantities that we are talking about and put in the large systems they are going to be economic, and the cost of providing the service—the overall cost of providing local service is going to go down.

We think that that capability will also—that kind of network if put in place will also provide additional capabilities at lower cost.

Senator **Inouye**. May I now call upon our in-house expert?

Senator **Packwood**. I want to take another guess at the definition, because I know what the Chairman is saying. When you use the word "wire" the bulk of us in the public think copper wire. We wired our lamp with it, or we have seen a telephone wire. That is a wire. Fiber optics is a different form of wire, and it is really a light transmission rather than electric transmission, but the public does not have to worry about that. The easiest way to explain it is that on your telephone wire you could not now currently take in on that wire both the video cable and the telephone, could you, on that wire?

Mr. **Foster**. That is correct.

Senator **Packwood**. On a fiber optic wire you could take in the telephone service, the television and dozens of other services. The advantage of the fiber wire is that it has such an immensely greater capacity.

Mr. **Foster**. That is correct.

Senator **Packwood**. That is all the public has to understand about it, and I think that is all they have to understand for purposes of yes, we could get more things.

Now, I did not understand what you said, Mr. Gillett, about—cable can put in a fiber optic wire to the house for $100 to $200 a house? I did not hear what you said.

Mr. **Gillett**. No, I am sorry, if you heard that obviously I said it incorrectly, senator. What we can do is, we can build a high-capacity, high quality network is fiber to a remote site much like cable or telephone companies put fiber to their remote sites and then go from that remote site via COAX to the house.

Senator **Packwood**. That part you can do a lot cheaper than the phone company can?

Mr. **Gillett**. Absolutely.

Senator **Packwood**. Why is that?

Mr. **Gillett**. The total cost of the network use of fiber end to end is only a couple of hundred dollars per house. The reason for that is because the efficiency of a distribution network is compatible with how consumers look at television. They want a lot of TV channels to the back of their TV. It is the TV that is doing the selection.

Senator **Packwood**. Let us back up for a moment. You and the phone company would use the fiber optics, what I call the backbone, and for both of you that cost would be about the same.

Mr. **Gillett**. Other than the fact that we happen to put it in a little bit less expensively than they do, right. Our labor rate happens to be significantly less than the telephone company's labor rate. It turns out that we happen to use—we do not use digital techniques. We happen to use AM, and I hate to be technical, but we do not use the same technology. Our technology is less expensive than their technology.

Senator **Packwood**. Mr. Collins is shaking his head. I think he is disagreeing with your statistics.

Mr. **Collins**. Yes. I think he is talking about putting fiber in part of the network, but if you average it out with the fiber plus the COAX he is talking about $200 per home, and he puts in a one-way network. We put in a network that is interactive. You can communicate both ways. It is digital. It is a high quality, more flexibility in the network, and our cost would be the same as copper per household within a very short time—a couple of years.

Senator **Packwood**. Do you agree with that, Mr. Gillett, or not?

Mr. **Gillett**. No.

Senator **Packwood**. Okay, I have got that. You disagree.

Now I want to go to Mr. McLaughlin. I found your statement most interesting, that we really ought to be using dirt roads in the rural areas.

I can just see it. I leave Portland on the six-lane interstate, and as I get about 25 miles out of town I suddenly go off the interstate onto the dirt road, because there is not enough traffic. Is that what you are suggesting?

Mr. **McLaughlin**. Let me put it this way, senator. I frequently envied many of my colleagues in western states who can sit out there on that interstate for hours whipping along while I sit on the Jersey Turnpike or the New York Throughway or the Mass Turnpike jammed up to my ears in traffic.

I say infrastructure is frequently a leap of faith, and we filled up a lot of those highways. Twenty years ago an awful lot of those highways were awfully empty. Now that is, of course, what the Telco people are telling you would happen to their fiberoptic capacity.

Senator **Packwood**. Do not answer more than I want to ask.

You served in the State legislature, did you not? I know I did. When we were building highways, before we had a lot of Federal money, we realized that rural highways probably did not "pay their way" but we did it from a social standpoint because we wanted to connect the State, and I think that is where your infrastructure argument falls down.

It is not unlike the cross-subsidization of rural telephones, where we allowed—we said, we want telephone service throughout the Nation, and if we are going to wait for it to pay for itself in the rural area, they will not have any telephones. That is not good for Portland if I cannot call La Grande, or it is not any good for Portland if I cannot drive conveniently to La Grande, even though I realize that the phone or the highway does not quite pay its way in and around La Grande. Is that a bad argument?

Mr. **McLaughlin**. No, it is not a bad argument and if I had gone through my whole testimony I would have talked about the public goods nature of infrastructure, and that is the essence of public goods in a sense, and the idea that we do do that averaging. We got telephones to everybody in the country, or practically everybody in the country, by doing an awful lot of cost averaging and price averaging. It is not an irrational argument at all. It is not always the most efficient way, as you would recognize if you were going by the marketplace.

Senator **Packwood**. I want to ask you a further question. This was on your straight-out cost. All of the income all of the cable companies had from all of their sources was about $13 billion, and you are saying that there is not an economic justification for cable or fiber to go to the home, that it would simply be an over-building and there is no market. You could not justify the return on what it would cost you to do it.

Mr. McLAUGHLIN. Well, let me put it this way. For those systems, like Senator Ford referred to here in Washington with 60 some channels, modern cable systems, there is very little incentive to go out and replace that right now, when you have an awful lot of band width available. Like I say, in Massachusetts, I have 76 on my station. The idea that I should pay, under the name of infrastructure, for someone else to come in and duplicate that——

Senator PACKWOOD. No, I understand that. I just want cost now, because you may be onto something. I want to ask the telephone people and the cable people about it. You are simply saying there is not sufficient market in the home to justify the kind of building that the telephone companies are talking about?

Mr. McLAUGHLIN. That is right.

Senator PACKWOOD. Could I ask the telephone companies, starting with Mr. Hunt, and talk to the telephone company people and see what they say?

Mr. HUNT. In my opinion I think there is—entirely too much of the discussion here has been related to the hardware. I do not consider myself in the copper and glass wire business, I consider myself in the telecommunications business, and I want to be able to compete to meet the telecommunication needs of my customers, and I will do so, if you let me, in the most economical way I can do it, and I am not going to stay competitive by providing any service to my customers on an uneconomic basis.

Senator PACKWOOD. I think you missed what Mr. McLaughlin is saying. We let you in, we allow you to do it. You put in what you think is a good wire system for all of these services that you think you can sell. Then you are unable to sell them, and now Mr. McLaughlin is saying that there is going to be sort of the equivalent of an S&L bailout for the telephone companies with all the taxpayers. Do I have it roughly right?

Mr. McLAUGHLIN. Yes, sir.

Senator PACKWOOD. Because you would have over-built thinking the market was there and it was not, and suddenly you have not gotten your return and then you holler "help." You are part of the infrastructure to all of the taxpayers. I think that is what he is saying.

Mr. HUNT. I think that is what he is saying, too, but that is not what we are saying.

Senator PACKWOOD. Mr. Foster.

Mr. FOSTER. Senator Packwood, regulation for telephone companies is changing. The testimony you have heard this morning refers to traditional rate-based regulation, which in fact is changing in a number of States right now. We have what is called incentive regulation, or price caps. The FCC is currently looking at it for the interstate portion and for a third of our telephone operating area we are already under incentive regulation, so if we go out there and make investments that do not earn a return, our shareholders eat it.

Senator PACKWOOD. I think what Mr. McLaughlin is saying is further. He understands that, but suddenly when your shareholders cannot eat it any more, you are going to ask us to bail you out.

Mr. FOSTER. No, I think what he is saying is under rate-based regulation we automatically go back in to the regulators.

Senator PACKWOOD. I think he is saying something more than that, even without rate-based regulation.

Mr. FOSTER. Regardless, I think we, for example, in most of our jurisdictions have to get approval from the State regulators for making investments, and for example in California before we place any fiberoptic plant the California Commission signs off that it is justified, appropriate for the services that we are going to provide.

Senator PACKWOOD. Mr. Collins.

Mr. COLLINS. Let me come at it from the perspective that the network we are talking about is different than the network that exists today, and our view is that we will see medical information services, interactive television services databases developed, and there is no question in our mind going into the information age of the 21st Century that those pipes will be full if we are allowed to at least get them started.

Senator PACKWOOD. Mr. McLaughlin, you would say simply that there is not the demand to fill the pipe?

Mr. MCLAUGHLIN. There certainly is not at the moment, and we are notoriously bad at forecasting this. As I say, scores of companies have lost hundreds of millions of dollars trying to develop the kinds of services that Mr. Collins has referred to.

I also want to clarify a point. I think Mr. Hunt's experience with HunTel and Kearney is symbolic of what I am talking about. Yes, as a consumer I would love to have two vendors out there competing for my business. That is nice. That is market competition. That is great stuff. But if I am going to have to pay for the market failure when one collapses, whether as a ratepayer of a telephone company or as a taxpayer under something labeled as a bailout, or infrastructure, then I think that I should be concerned about that.

To my knowledge, and someone can correct me if they know better, there has been no sustained competition between two franchise-wide competitors in the cable business in the country.

Senator PACKWOOD. I want to ask Mr. Hunt about that. Let me ask Mr. Hunt first about the Kearney experience. How big is Kearney?

Mr. HUNT. I think their population must be about 15,000.

Senator PACKWOOD. So they are way above the rural exemptions, are they, in your service area?

Mr. HUNT. No, they are not.

Senator PACKWOOD. So it is outside the service area, they invite you to come in?

Mr. HUNT. Yes.

Senator PACKWOOD. Did they—they had a cable operator there. Did they invite you in under probable cause, or what was the basis of the invitation?

Mr. HUNT. The company that was there was increasing rates, the quality of service was very low. From what I am told, they were—they had very poor customer relations.

Senator PACKWOOD. Okay, that is enough on that. You go in, you build, and the cable company then backed off their rate increase and they increased their services, and did you say that they basically cross-subsidized this service from their other monopoly service areas?

Mr. HUNT. Yes, I did.

Senator PACKWOOD. There is a natural tendency to do that, right?

Mr. HUNT. Apparently so.

Senator PACKWOOD. Would telephone companies ever do something like that?

Mr. HUNT. No.

Mr. COLLINS. No.

Mr. GILLETT. Senator, may I follow up on a point you made about your definition of fiber which I happen to like, more things into the home. I think this is really what we are trying to talk about, from the customer's end. Whether it comes over glass or anything else makes no difference except for what the customers are getting in their homes.

Mr. Collins mentioned the fact that maybe in a couple of years his network which he is thinking of might be cost effective, and that prediction always seems to be moving out a little bit on us.

I would contend that any home in any one of your areas in Oregon can in fact have any service you can name right now through existing technologies. There is not one that is not available to them. We could be providing those services today.

Senator PACKWOOD. On your present cable wire?

Mr. GILLETT. On either cable or the telephone networks. We do not have to have an infrastructure of the wire in America.

Senator PACKWOOD. I understand, but the telephone companies cannot bring in the television signal on their current wire?

Mr. GILLETT. Right.

Senator PACKWOOD. So to the extent I do not have cable, I cannot get all those services at the moment because the telephone company wire will not do it.

Mr. GILLETT. No; or you may then have to use satellite options, or you may have to use the new DBS that is coming. I think there are many infrastructures available to our country that, in fact, each one of them is trying to be built in a way to optimize its services in the most cost effective way.

I do not think we need to look for the answer. I think we need to look for a way to have all of these work together to the benefit of the consumer. We do not need to wait in any town in Oregon to bring, in fact, digital to the home. There is technology available today, ISDN, that could in fact digitize every home in any one of your towns right now to provide multiple services over a single pair of copper. The telcos have been talking about it for over a decade. We could be moving ahead with the services side and wait for the technology to get to the point where it may in fact be cost effective and appropriate.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Burns.

Senator BURNS. I was not even ready. I was going to wait on Senator Ford over there.

Senator FORD. That is the first time you have ever said that.

OPENING STATEMENT BY SENATOR BURNS

Senator **Burns**. Listen, I have had [illegible] lot of first times this last year. I am getting used to it.

Thank you, Mr. Chairman. I thank these gentlemen for coming in this morning. I have a statement for the record.

Mr. Chairman, I would like to take this opportunity to once again thank you and Senator Danforth for your leadership on this most important communications policy issue.

As I made clear at our hearing last Thursday, competition is the key to our response to the so-called "cable problem." I believe that the responsibility of this Committee is to free every technology available, and thereby promote competition.

I believe that this competition will arise if technologies such as DBS, Wireless Cable, the Home Satellite Dish market, and those technologies yet to be discovered, are able to compete and given the same incubation period that was given to cable in its infancy. But I think it would be unwise for us to rest all our hopes for competition on industries and technologies which are not proven and may not ever develop as we predict today.

I believe that we have to permit telephone companies to compete. However—and I want to be make myself very clear on this point—I am not endorsing unrestricted telco entry. Rather, I am promoting telco entry with safeguards and restrictions.

It is my sincere hope and desire that we find a middle ground—a compromise position—on the telco entry question. A position between the status quo, on the one extreme, and Senator Gore's approach in S. 1068, on the other.

Last Thursday, Mr. Chairman, we heard from Henry Geller, formerly head of NTIA and FCC General Counsel, who outlined what should be the agenda of this Committee. He said that "the long term solution is a broadband common carrier operation, one where there is very largely a separation of content and conduit."

I agree with Mr. Geller.

I believe that the absolute prohibition on telcos in video programming is bad public policy. I further believe absolute entry with no safeguards would be equally harmful.

It is the responsibility of this Committee to determine where that common ground is which promotes the greatest public good by unleashing competition and technology to meet the nation's needs.

I am confident that we can fashion a strict regulatory framework, with the help of the Administration and the FCC, which will permit telcos to enter the video business, while at the same time protecting the legitimate concerns of the cable industry, broadcasters, programmers, and, most importantly, consumers.

It will be this competition that will help ensure that a modern telecommunications infrastructure and innovative services are available to all Americans—and, most importantly, all Montanans—at reasonable prices.

First of all, let me premise this whole thing by saying that I believe the absolute prohibition of telcos not being able to go into the video business is bad public policy; but I also further believe that going in there unrestricted is also bad public policy, too. So we will lay that premise when I ask these questions.

I would ask these of the three gentlemen who are representing the telephone business. In your estimation, why do you need to be any more than a common carrier? Why do you need to be in the programming business as some of you have suggested?

Mr. COLLINS. I think there are several points there. First, any time you have a definition on programming you run into what is and is not programming. I think that creates a continuing set of arguments.

Number two, if we are not in programing to the extent that we can at least joint venture or partner, I do not believe we can be assured that there will be sufficient information services available to justify our investment. We do not expect to control or have even a large share of the information services that go on our network, but we heard a gentleman here say he doubts that there would be information services sufficient to fill up our pipe.

We are willing to take a risk to invest in the development of that programming so that we can see the development of information services that will fill up the pipes we are talking about.

Senator BURNS. Mr. Foster, would you like to comment?

Mr. FOSTER. I agree with that completely.

Senator BURNS. If telcos are permitted into the video business, what safeguards can we develop that would be acceptable to you folks, to the telephone companies, which would eliminate the incentive or the opportunity to cross-subsidize?

I think Senator Packwood very ably brought it out that Mr. Hunt thought he was a victim of some cross-subsidization as far as using the profits of one monopoly to subsidize another, and I have a feeling that all human failures are alike.

What would you accept as far as some safeguards to be allowed into the video business?

Mr. FOSTER. We have safeguards today, Senator, because we have regulated and unregulated businesses, and the FCC and the State commissions have very explicit, extensive regulations, and we are constantly audited to make sure that we are toeing the line.

Those safeguards are important because we could abuse our position, and so we certainly support that. They need to be in place. We would support any other safeguards that people feel the need to be added. I cannot imagine any, given all that we face today, but we certainly are not against rigorous protection to ensure that our regulated business is not cross-subsidizing the unregulated.

The FCC and Congress have already permitted us to be in both regulated and unregulated, so the issue is not we are going to be regulated over here and it is going to protect the public from any cross-subsidization. We already have public policy that we are going to be in both.

Senator BURNS. Mr. Gillett, would you like to respond to that? You have had experience in both areas.

Mr. GILLETT. Thank you.

Considering your opening comments, I hope you are not going to withdraw your invitation for me to come to Helena next week.

Senator BURNS. No, no. You can come down. I am not going to ask any questions of Mr. McLaughlin because you would have to come up there on a mud road.

We might not make it.

Mr. GILLETT. Regarding one of the comments about the need to develop information services, I do feel uncomfortable with the comment that in order for information services to progress in this country we need to have telephone companies develop them. I think there are a lot of people out there who have information services available today that could be delivered.

I get concerned, for example, about the promises we made about gateway services, and they seem to be disappearing. We had opportunities. We have heard analogies. In fact, Mr. Collins' chairman talks a lot about the Minitel experience in France and the need to have that type of a service here in America. We can have that today. We have information providers that are available today. We have an infrastructure that can allow the delivery of that service today, so let us get on with it.

So I do not think we need to have to wait and say, no, I am sorry, we are not going to give you information services unless you let us invest in it. I do not think that is the right answer. I think we ought to be encouraging those people who are doing information now to put their packages together and use the existing networks to get them into America now

Senator BURNS. Mr. Hunt, would you like to respond to that, sir?

Mr. HUNT. Senator Burns, I will say that way over half of my business is in the unregulated segment of our business. We are not asking for laissez-faire opportunities to do any cross-subsidization. We have lived under regulation forever. We have no objection to careful oversight to make certain that there is no cross-subsidy.

Mr. COLLINS. Senator Burns, may I follow up on the gateway question?

Senator BURNS. Yes.

Mr. COLLINS. There have been a couple of gateways that have been turned on, but in Bell Atlantic we have gone to the court to seek additional relief so that those gateways can be made effective.

The problem here is very similar to the one we are addressing in this committee. The definitional questions come into play and have limited the capability of the network to be user friendly, to do the content and navigational kinds of aids that customers need to go into the gateway and reach the information services and then manipulate the data in the information service.

I tried one the other day. I wanted the condition of one company's financial status. I could not turn it off once I got into the gateway. It took 21 pages to stop it because of lack of navigational aids. They are the kinds of things that we need to be able to do at least in the gateways to make them viable. We need to work with the information providers very closely. Those things are prohibited today to achieve effective gateways.

Senator BURNS. I do not think there is a Senator who sits on this committee who does not see some opportunity here for the telco entry into some type of video services or programming services.

I guess I look at it from an old standpoint of REA years ago, and I would go back to Mr. McLaughlin, that if it were not for REA and our subsidization of electrifying rural America we would be watching television by candlelight today.

That is pretty graphic, but we are looking at extended classrooms and rural health and this type of thing which I think the Senators want. They have rural schools and rural health systems in their States, and we are trying to find a way to better serve or interconnect those types of situations in our respective States and how we approach that and what sort of rules and regulations we are going to have to put in place to make sure that we ensure the viability of the cable industry, which I think is very important, and also open up some doors of opportunity where we know that the cable people right now will never get into an interact business as far as rural America is concerned.

I guess that is where I am coming from, and if you would like to respond to that, if you can come up with some answers, well, I certainly am a willing listener.

Mr. FOSTER. Senator Burns, may I make one comment, please?

Senator BURNS. Sure.

Mr. FOSTER. Right now we are working with a major medical institution which treats cancer patients, and the cancer patients are required to be treated and then be immobilized for about 30 minutes while doctors are reviewing the first treatment to see what should happen next.

We are now working with them to connect this treatment center with the Cray supercomputer so that they can get very quick reaction to the first treatment and focus then on the second phase in a matter of minutes. This reduces the time the doctors and the patients have to wait.

You know, all hospitals cannot afford a Cray supercomputer, but our switch broadband network could connect every hospital with every supercomputer, and that is just one example.

Now I understand that many people like the vision of seeing how this network could be used, but the other countries of the world do not like that vision, and we do not like that vision. We are willing to put our money on that bet. We are not talking about the bailout of an S&L. There is no guarantee for our shareholders. Our shareholders will lose.

So I think that analogy is certainly a very inappropriate one.

Senator BURNS. Let me explain one thing. When we start talking about rural health and those types of situations, we are talking about two-way interact immediately, both video, audio and data more or less in the same transaction, if you may for the lack of a better word. I guess that is what I am looking for here.

Mr. McLaughlin, you had your hand up.

Mr. MCLAUGHLIN. Yes. I have two points. One, I think there is some disingenuousness going on here. If you have a community that is not wired for cable today, it is not going to be wired for fiber optics tomorrow. Communities get wired based on the economics of it, and the 15 percent of the country that is bypassed by cable today is not a very good candidate for the telcos going out and spending money to put in fiber optics.

Maybe satellite services, digital cellular radio or whatever will become much more attractive, but I think that when I hear of what other countries are doing, I keep asking what is it that they are doing that we do not have.

The American consumer of telecommunications, corporate or small, is probably the best-served customer in the world, so I have my doubts. We used to talk about patriotism being the last refuge of scoundrels. Today I think it may be the information age infrastructure.

I would like to return, mud roads and all, to the earlier point you mentioned, REA, which is a great example. This country spent an awful lot of money through REA wiring up hundreds of communities that literally no longer exist. They have blown away. That was wasted investment. Now we may have kept other communities in place by doing that, and I know that that is not a popular observation particularly in the Senate, but it is a true one.

Now Mr. Collins referred earlier to this great planned implementation of all the technologies and doing it on a very economic basis. I sat around with the National Association of Regulatory Utility Commissioners about five years ago when they were trying to figure out what happened to $25 billion of investment which telephone companies said, well, it just was not depreciated fast enough and it was obsolete. A lot of the commissioners seemed to feel that the telephone companies had overinvested that money, particularly under rate-based rate of return schemes.

So if we go out and spend hundreds of billions of dollars to build a fiber optic network, somebody is going to be asking to get paid for the investment.

Senator BURNS. Mr. Gillett.

Mr. GILLETT. I think the use described by Kent of medical imaging between a center and a Cray computer obviously is the right use for fiber optics. What we are talking about today is whether you take fiber to the home. That analogy does not follow into saying we are going to have Cray computers in our homes. That does not make sense, I think.

I do believe in your rural education example, that there are other technologies coming along that are going to make some very exciting opportunities for two-way voice, data and video interactively. NASA is putting up an experimental satellite in two years in which cable is participating. It is called ACTS. It permits two-way interactivity on selective spots when you need it. So instead of having to say we are going to take fiber to every classroom in America and wait for that to happen, that satellite can in fact have the capability of reaching between any two points at any one time, which will in fact allow us to move forward to those type of services much faster.

I would like to add just kind of a philosophical comment about rural America. One of the powers of telecommunications is, in fact, enhancing the ability of our citizens to live anywhere in America. You do not have to get into large metropolitan areas where it becomes very difficult to live. Having just moved to Colorado, I love the experience of now being in a state such as that and enjoying that environment, and through the powers of telecommunications we will bring services and skills and talent to any place in America. We support that, and I think our technologies are going to do that, and it is going to be this multiple infrastructure that will allow that to happen.

Senator BURNS. We will probably find out there are some things out there, that "it ain't all in Cambridge".

Thank you, Mr. Chairman.

Senator INOUYE. Senator Ford.

Senator **Ford**. This is an interesting discussion. I found out why some of us are enjoying life and others are worried about what is inside the Beltway.

Mr. Chairman, before I ask any questions I have a statement here from the National Association of Counties that I would like to have included in the record.

Senator **Inouye**. Without objection, so ordered.

Senator **Ford**. I would say to my good friend from Montana and others, having served in the legislature and having been governor, I found out that those of us, and I understand very well, those of us in public positions have a responsibility to all citizens and not just a few, and you referred to roads, Mr. McLaughlin. We take a portion of the gasoline tax in our state and that is allocated to what we refer to as rural roads. And we have a highway commissioner, a deputy commissioner who is in charge of trying to see that our rural road program is adequate, and that gravel roads become blacktop roads and that we have farm to market roads.

And so many times they talk about a big road. You probably do not understand what a big road is. But a big road is an interstate and what we want in my state and what my people want is a get to it road. We know it is out there somewhere, but we cannot get to it.

I want you to know that what I am thinking about here is to give my constituents the opportunity to receive cable, and I think competition will probably be the best way. I hope you are not opposed to competition, and so I am sure if we do not allow our people to be competitive, the Japanese are going to take it away from us. They always have so far, VCRs is a good example. We research and develop, but we do not put it in the marketplace. And we are restraining competition with the attitude you take here today, and I have some concern about it.

The medical question that you brought up, Mr. Foster, we have a lot of rural hospitals, Mr. McLaughlin, that have some pretty decent surgeons. But they need some help quickly with a special kind of information, and they need to be tied into a medical center. Well, that is quick and they can observe the surgery, and the data can be put into the equipment very quickly and lives are saved in rural areas.

And so we have the responsibility of being fair and doing the best we can.

Let me ask this question. If we do not have competition—we look at rural areas. We find them spending $3,000 for a dish so they might be able to sit at home, upper hollow or on a bench, and if you do not know what that is, a bench is where they cut a piece back into the mountain and they can set a trailer or a home on it. But they have got this dish sitting up there that they spent $3,000 for, finally they were able to relax, and have the children gather at night and watch the television program and lo and behold, the cable programmers do a little something to it so they cannot see it. And if you want to fix it, you have got to pay the cable company more money after you have already paid $3,000. They scramble it, and I do not like it.

And that is digital. You pay them so much and they put it in, out in Colorado somewhere, Denver maybe. They take this computer and they check your number, and they take you off of the scramble. But you pay them so much per month.

Once you figure out a way to beat them, they turn around and beat you again, you know. Like Barnum said, a sucker is born every minute. He forgot to tell us that two people were looking for him.

Now, let me ask what towns are blown away, Mr. McLaughlin, that have REA, received REA?

Mr. McLAUGHLIN. Senator Ford and I had this colloquy many years ago when I was at the Post Office. There used to be 110,000 post offices in the United States and 70,000 of those represented towns that no longer exist.

Senator FORD. Were they incorporated by larger towns or did they just go off the map? What happened to them?

Mr. McLAUGHLIN. Some of both. I have certainly seen what used to be towns in a lot of the Great Plains states that are deserted today.

Now, I do want to go back to your question, though, in the other sense. I think it was probably criminal on the part of cable people to go and try to encrypt that signal for people who were out in territories that were not being served in the first place. I have no problems with that. I am not sure that your constituent is going to be helped, especially if they have already bought the $3,000 cable dish, by having the telephone company go out and in that particular case if they were ever to do it, spend at least $3,000 to run in a fiber optic cable. And if it is a rural as you are describing, it is going to be a lot more than that.

Senator FORD. Well, they have a telephone now.

Mr. McLAUGHLIN. Sure. And I am simply saying run the fiber optic cable out there today to provide them cable T.V. over that is going to cost at least another few thousand dollars. Somebody is going to pay for it.

Senator FORD. Well, that is true. I understand that. But what is wrong with them trying and us trying to get that cable system out there to those people so they will not have to go to these—to make these hard decisions and making that monthly payment. They are not the richest people in the world, Mr. McLaughlin. They come by pretty hard.

Mr. McLAUGHLIN. I understand, but do you think somebody is going to give them that cable service free over the fiber optic cable, too?

Senator FORD. No, but I want to tell you that the dish was not given to them either, and they signed a note and made monthly payments on it. That is no different from making a monthly payment each month to the telephone company.

Mr. McLAUGHLIN. But now they can do both.

Senator FORD. Sure they can do both. Absolutely they can do both. But those that do not have it and do have the telephone have that option that they can make that payment and receive their T.V. I am for that, their cable.

The thing that bothers me is that we are trying to make telcos a common carrier, and they have no ability to stop what is going through their cable in my opinion, and so we leave them out as a competitor. All we do is make them a common carrier.

I have seen a lot of businesses put out of business here, particularly in the natural gas pipelines when instead of being able to do it for themselves, we forced them into common carriers. When we forced them into common carriers, they are no longer in business and cannot guarantee you under contractual agreements that they will deliver the gas.

So you talk about roads. Let me talk about natural gas pipelines. It is all the same thing, and you can take, I guess, joy in saying that roads are the same thing or I can take natural gas and say it is the same thing. It is a pipeline that is trying to get at somewhere. And if you take away the ability of the company that works so hard over the years and bring it to a point where government says no, you cannot deliver to customers anymore, you have got to be a common carrier and anybody who wants to put it through that pipe, and you cannot stop it. So, that is what I think we are doing to telcos here.

Let me ask you something, Mr. Verveer. It appears from Wilkie, Farr and Gallagher that you might be an attorney.

Not being an attorney I need awful good legal advice. I have found that those that are against telcos—and I happen to be for them on a limited basis, the same as my friend from Montana—are saying that this provision is unconstitutional. Do you have any comment to make as a lawyer as it relates—and maybe Mr. McLaughlin from Harvard can tell us what this is.

Mr. VERVEER. Senator, I am certainly not a First Amendment expert. I think the argument you are talking about is an argument that says that it is impermissible for the government to restrict the speech of any entity.

My own view is that that is not unconstitutional. The Supreme Court in about 1978 in a case involving somewhat similar rules, broadcast-newspaper cross-ownership rules, said that it was permissible for the government to prevent someone who owned a newspaper under some circumstances, for example, from speaking as a broadcaster and vice versa. And so I do not believe that there is a flat case that the cross-ownership prohibition is unconstitutional.

Senator FORD. Mr. Gillett, let me ask you this question. Is not all cable running into homes now just receive only?

Mr. GILLETT. No, sir. All cable is not just receive only.

Senator FORD. Well, there is that Q system out there where you would ask the customer questions and they answer back, but you do not have much of that around, do you?

Mr. GILLETT. Two-way inter-activity unfortunately has been a service that we have not found a lot of use for, so a lot of our systems do not have it. It is not, in fact, something that can be added to our networks.

However, you know, I tend to prefer using where necessary the existing two-way system—that is telephone—for what it is good at, two-way, and using our system for what it is good at. That is distribution to a lot of homes for broadcasting.

You know, Senator, if I might comment on your discussion of kind of concentrating your rural hospitals, I suppose maybe to a center in Lexington or something like that——

Senator FORD. We have another at U of L that is pretty good, too. We are moving right along in Kentucky.

Mr. **Gillett**. But that service which I get very excited about, I think it is the type of thing we should be doing. You know, GTE serves a lot of your state. They could be offering you that type of interconnectivity.

Senator **Ford**. And we are doing well with it, and I am proud of it. And we are doing that now, and it cost us some money, and the state cooperated with them, and it gets back to that you have to treat all citizens reasonably fairly. And so when you want to treat citizens fairly, you have got to try to help them improve in all areas and give them an opportunity in all areas.

Did you know in this country you have the right to go broke? And that is what the telephone companies tell us, I guess, that they are willing to take a chance not supported by the Federal Government, and they are willing to take a chance on this, and they have an opportunity to make some money, as Mr. McLaughlin said, or lose. Somebody is going to pay for it. That is the stockholder; that is the chance they take.

Mr. **Verveer**. Senator, if I could address that, it resonates somewhat with what Senator Packwood was asking.

I think the simple fact is that telephone company shareholders cannot take all the risk. They cannot bear all the risk because it is not acceptable for us as a society to let the financial condition of a telephone company deteriorate to such an extent that it affects the quality of service, the availability of service.

Inevitably we as taxpayers are going to guarantee speculative investments that telephone companies make. The mind of man has not devised a way to insulate the capital structure of a business from the totality of the business activities it engages in. So that a speculative investment and particularly a large speculative investment gone bad is going to bring us as taxpayers into the arena just as surely as the collapse of our financial infrastructure in the S&L crisis has.

Senator **Ford**. I think you are trying to frighten us a little bit. We do have public service commissions out there that have the ability to look at all these requests, and I am not sure that they are going to be looking at the rate base and they are not going to allow this to happen, in my opinion. At least, I would hope not. I hope every state would have the judgment.

Mr. Foster, did you want to comment?

Mr. **Foster**. Yes, sir. Thank you, Senator.

We today have 50 percent of our equivalent voice circuits being served over fiber, and what we started with was the most heavily concentrated transport or path between central offices, and we are moving, and so we are not going to take gigantic risks entering some risky speculative business. This is a migration, and what we are looking for are signals as to the rate of deployment, but this is not something where we just immediately open the flood gates and start pouring out huge amounts of investment.

But, again, the comparison to S&Ls is really a flash word or a code word here because they are trying to say that the Federal law will protect telephone companies in the same way that depositors have been protected in S&Ls, and that is certainly not the case.

And we are willing to take all the risks for entering this business. We are certainly willing for the state regulators and the Federal regulators to look over every single investment piece by piece, step by step to monitor the results and anytime they want to stop us, they have the authority regardless of what happens here to stop us.

And so all we are asking for is to give us a chance.

Senator **Ford**. Mr. Foster, thank you.

And, Mr. Chairman, I am going to tell a personal story, and I tell you why I tell this personal story. I think our children ought to have an opportunity to have interactive communications system within the home.

I have five grandchildren, and I am very proud of them. Several years ago, one of them was in the third grade and wanted a computer for Christmas. And the parents said that it was too expensive, she could not have one, she would have to wait.

Well, she went to the court of final resort, and grand daddy got her a computer.

Then, she wanted a color printer. [Laughter.]

That was a little bit more difficult. But she went to the court of last resort and he said yes.

Now my younger ones are sending me birthday cards on a fax. And I want them to keep it up. Somehow or another, if we take this legislation and say, there is no competition, we want the roads out to the Beltway and beyond that to be gravel or dirt, we cannot do that.

I remember the professor that said, you will not like me when you leave this university, but I am going to drive you to the wall, because the answer to cancer may be in this room. So I am going to tell you, I am going to do my best to give the people the opportunity to be competitive so our people will have an opportunity to make a choice.

And if you limit the homes to receiving and not the interactive, then we are not giving our people what they deserve. Now whether we come up with the right answer or not, I do not know. And I have taken too long and I apologize. But I have got it here, and I want to try to get it out here. A fellow said, oh, Ford is bilingual. He has bad English and he is Southern.

But I want you to know that I have a very strong feeling about what I am saying, and I intend to do the best I can to see that it is accomplished as an end result.

Thank you, Mr. Chairman.

Senator **Inouye**. Thank you.

And now the author of the measure, Senator Danforth.

Senator **Danforth**. Thank you, Mr. Chairman.

I really have one question to ask, and I would like each member of the panel to answer it. How many cable companies can coexist in a single market? Or, putting it differently, if telephone companies are allowed into a market, will they compete with existing cable companies or, instead, will they replace existing cable companies?

Mr. Hunt, would you like to start, and then we will just move from right to left?

Mr. **Hunt**. Yes, I would like to respond to that.

I do not see any reason to believe that it is not possible for two companies to compete for that business. The reason we failed in

Kearney was simply because the other company was permitted to cross-subsidize.

Mr. FOSTER. I think we need to let the marketplace determine, Senator, how many services the customers are willing to support. If we are permitted to build our network, we will bring many competitors. We can bring in a competitor who wants to focus on a certain segment of our society. So they can buy bandwidth to any home or any business they want to purchase it for.

And so the marketplace needs to determine how many services the consumers will support. We cannot answer that question.

Senator DANFORTH. Your belief is that in a single community there could be several cable companies serving the same geographical area?

Mr. FOSTER. I do not think we need to think in terms of cable companies. For example, the New York Times could offer services to certain markets.

Senator DANFORTH. I am just talking about the cable company.

Mr. FOSTER. You are talking about the transport?

Senator DANFORTH. Yes.

Mr. FOSTER. Well, certainly, in urban markets there will be many networks, broad-band networks carrying voice, data and video. There are today in most major markets, I think, multiple networks.

Now, how many of them could connect all the homes together and all the businesses together, I do not really know. It just depends upon how that market develops. But we do believe that one network should be there, and that is the only network that connects all the homes and businesses that is interoperable and permits anyone to talk to anyone.

The cable networks are totally isolated. They are not interoperable. They do not have an obligation to serve. And we think, at least, the telephone company ought to be permitted to build that network.

Senator DANFORTH. Mr Collins.

Mr. COLLINS. Senator, today in many places there are two coaxes and six copper pairs going in, and I do not see any reason, when we go to an information intensive age where people do a lot more management of their business and a lot more of their personal life at home, why there will not be enough demand to permit more than one common carrier-type of facility into their home.

Mr. GILLETT. Senator, if you are talking about the physical networks to the home, in my opinion, either for telephone or for cable, it does not make sense to have two networks doing the same thing.

Senator DANFORTH. I am sorry?

Mr. GILLETT. It does not make sense to have two networks doing the same thing. Much like if you asked your telephone friends, do you think it would be cost-effective if the Bell Atlantic person on my left was in the area of GTE and they both had the same copper pair or fiber pair to the home, and they were both offering telephone service, if it would be economical? I think their answer would probably be, no, it is not economical for either of them.

I think it is the same situation for cable. Multiple servers of the same service has not been cost-effective because of the cost of the infrastructure. I think that is why we are trying to say, you have two services in America everybody wants to do, they want to talk on their telephone and they want to watch television. I think our objective should be made certain that we can cost-effectively do that every place in America.

And then, between those two networks, either independently or dependently, all of these information age services can also be provided. I think it is a tremendous strategy that we can follow, where you can do what everybody wants today much better, with higher quality and lower cost, which also allows us to in fact grow and enhance and offer new information services.

Mr. VERVEER. Senator, it seems to me the record, to the moment, suggests situations where there is more than one broadband transport system into the home are very rare. There are some few places in this country where it has gone on for some period of time. There are some other places where there has been an attempted entry, but the outcome, more often than not, has been that the attempted entry has failed, just as Mr. Hunt had described.

There are two things that are important in terms of resolving this question in the future, separate and apart from where technology may take us, which is something I think is very hard to predict.

The first is that whether there will be more than one is an artifact of regulatory arrangements. And it will be an artifact of governmental decisions. And specifically, a consequence of how the government decides to allocate the costs between the transport attributable to telephone service, the transport attributable to cable service, and the transport attributable to other services.

Clearly, that government decision at state public service commissions and at the Federal Communications Commission will affect the outcome of whether or not there is more than one entity providing transmission services. And the implications of what I have just said are quite numerous, in terms of the welfare of telephone ratepayers, among others.

The second thing that I think is important to say in this context is that the cross-ownership rule has very little to do with this. Telephone companies can build fiber today. They are building fiber for many, many uses. And whether or not they are allowed to integrate into video programming I think has almost nothing to do with whether or not they get a chance to offer this transport service.

Mr. McLAUGHLIN. Senator, I will simply second the fact that, with the exception of Kearney and one Centel system that I know of, in both those cases where there were competitors, one failed. One was forced to sell out.

Now I cannot predict that, for the future, the technology will not change. I guess someone earlier said that this bill is short term and a quick fix and not a lasting solution. I think you are dealing with something where the technology is changing sufficiently quickly that you are going to have to revisit it in five years anyhow. There is no way of getting a lasting solution in this area.

I would like to make a qualification, though, and this relates back to Senator Ford's observations concerning the obligation to serve. Competition works well in a lot of these markets if we are willing to settle for the results. And if we were willing to settle for the results of a totally competitive telephone industry, gee, I would have lots of options in a densely populated area, and Senator Ford's constituents would be in trouble.

Now the cable industry is happy to go into a lot of competitive situations if you do not make them overbuild the entire municipality or the entire county. We have required them to do that as an obligation to serve in most instances.

So the competition might work very well if we were willing to accept what the results would be in terms of who got served, who got a lot of service, who got a lot of competition, and those people who did not get served.

Mr. COLLINS. Senator, it could be that the reason those systems have failed is there has not been enough content and information services available. We offer that opportunity.

Senator DANFORTH. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Kerry.

Senator KERRY. Thank you very much, Mr. Chairman.

I listened with interest to my colleague, the Senator from Kentucky, and wanted to pursue some of the inquiry regarding the question of competition that he raised. But, if I ever get in trouble, I hope he will be my court of last resort, too. He sounds pretty good.

I am concerned, I have not really decided, but I have some deep-rooted concerns, not the least of which is the notion that there is not an inherent contradiction in the fact that we are sitting here, at least as currently structured, talking about reregulating and imposing restraints on the cable industry, while simultaneously talking about bringing the telephone companies in to compete in a way in which I think, in the structure that is currently set forth, establishes a government-imposed imbalance in the competitive structure we would then put into place.

And let me try to get at this a little bit more precisely, Mr. Collins and Mr. Foster. I read your testimony, and you say the removal of the barrier to providing video programming would have two critical consequences. Your first critical consequence is you would give the telephone companies the assurance that their broad-band facilities would be utilized and supported by some video service.

Well, the way I read that, that is a benefit to you, the telephone companies. So that is the first critical consequence, a benefit to the phone companies.

The second critical consequence is it will give the public a broader choice of programming. Those are the two critical consequences.

What programming? Whose programming is it going to provide? What is this base of programming going to be?

Mr. COLLINS. Senator, I made those two statements. The assurance part of the statement is to assure that at least there would be some development of new programming for the network investment that we are going to make.

It would benefit us only in that it would guarantee there would be some information services on our network. It would benefit us from the fact that we would stimulate others to come in and offer additional video services. That is what I am talking about under that condition.

The second condition is that we would invest in new programming, and we believe, through partnerships, joint ventures or otherwise, we believe that that would stimulate lowering the cost of programming available, making more diverse programming available. That is our intent.

Our intent is not to have a large portion of the information services, but to stimulate it, and assure that we have revenues to pay for the network.

Senator KERRY. Well, following that up, in terms of assurance of the revenues to pay for it, many people today have questioned the demand, obviously, from many of those services.

I am wondering how it would be possible for you to capitalize to the tune of what, $200 billion to $400 billion or so that people estimate it will cost to put the fiber to the home, and then provide competitive services that would include public access channels, C-SPAN, local government, public affairs, at a lower cost to consumers?

How are you going to do this at a lower cost to consumers?

Mr. COLLINS. The $200-or-so billion that is talked about to rewire the Nation with fiber is going to be spent anyway. Because as we go forward, fiber is going to be the more economic medium to bring the signals to the home. So we are going to spend that anyway.

What we would like to do, with the right incentives, is to be able to speed that up so we get the benefit of it sooner.

Senator KERRY. If that is true, why is not there an automatic cross-subsidy from the word go?

Mr. COLLINS. No, there is not—this is a——

Senator KERRY. I mean, you say you are going to do it anyway as a telephone company now, to provide telephone service, then what you are asking us to do is to permit you into a programming area which allows you to compete against an existing industry at a great advantage. There is an automatic cross-subsidy in the fact that you are going to do it anyway.

Mr. COLLINS. No, if we are going to do it anyway, it is going to take 50 years.

Senator KERRY. Well, it does not matter how long it takes, does it? The question is you are doing it.

Mr. COLLINS. The Nation needs it sooner, in our view. What we need is the assurance that there will be the information services on the network earlier, so that it justifies the speed up of the deployment. That is the whole story.

Senator KERRY. Who is paying for that?

Mr. COLLINS. The stockholder would be paying for it.

Senator KERRY. Well, who pays the stockholder?

Mr. COLLINS. The ratepayer pays for the service received.

Senator KERRY. Right, and that makes enough money so that the stockholder gets a dividend; correct?

Mr. COLLINS. Yes. The stockholder has the right to reinvest the dividend in the telephone company, to take it in terms of a dividend or to invest it.

Senator KERRY. There are no dividends if the ratepayers are not paying for a service on a common carrier basis.

Mr. COLLINS. That is correct. They pay those rates today.

Senator KERRY. If those rates are going to permit you to provide video programming on something you are doing as a basis of those rates paying for them in the first place, that is a subsidy as far as I read it.

Mr. COLLINS. I believe that is incorrect, sir. Those revenues that a customer pays today for telephone service, the customer has received telephone service. That revenue then belongs to the stockholder, and the stockholder has a right to invest it back in the telephone business, or the stockholder has a right to invest it in the information services or in telephone companies around the world.

Senator KERRY. Are you going to sit there and tell me that the amount of money available to reinvest has nothing to do with the rates that are set?

Mr. COLLINS. I am not sure I understand the question.

Senator KERRY. Are you saying that the amount of money that you may have available to reinvest into the video programming into competition with this other industry has nothing to do with the amount of money that is being paid in rates?

I could not believe if you were going to say yes that you would believe that.

Mr. COLLINS. Well, there are more sources of revenue than just those dividends. We can borrow money to put into that investment.

Senator KERRY. Is it your current intention to separate a subsidiary exclusively that will borrow money from the word go so that you will have a totally segregated video programming and totally segregated video information service and interactive service?

Mr. COLLINS. We have not gotten that far along but, as Mr. Foster, said, I would expect that the cable function, the information function would be in a separate subsidiary. Whether it is funded from the stockholders' revenues that are entitled to him or whether that subsidiary goes out and raises funds I think is something we have to look at downstream.

Senator KERRY. You do not think it is something we should look at upstream before we do it?

Mr. COLLINS. You have the prerogative and rights to look at whatever you like.

Senator KERRY. You see, my concern is that this February NYNEX was fined $1.4 million by the FCC in the biggest penalty ever imposed on the telephone company, and they were ordered to refund $35 million for taking part in deals that improperly inflated NYNEX's profits.

What was happening in the process, the phone companies added $35.5 million of bloated costs to the fees that they charge long distance carriers for hooking up to their networks.

Mr. COLLINS. Senator, I think the real point here is if they did that—and I guess there is still some debate about that—they got caught. That proves that the FCC has the willpower and resources to catch anybody that does that kind of cross-subsidy.

Senator KERRY. That was the whole issue. That frankly is the question, because during the time that the announcements were made about this, the stiff penalty and the refund were characterized as the FCC's way of trying to answer critics who have said that it has not been adequately regulating the industry. I do not know the answer to this, but there are many analysts who suggest, quoting one of those analysts from a company called Economics and Technologies which specializes in telecommunications policy, saying this is just small potatoes ripoff compared to what we think they are doing elsewhere.

Now I am concerned that the cross-subsidy issue is a very difficult one to deal with, that it may be impossible. I am not saying that the common carrier aspect of this does not conceivably make a lot of sense from an information highway perspective and in terms of the need to wire households and so forth, but I am questioning whether or not it is sensible at a time when we are dealing with an industry that we are trying to measure the competition from DBS, the competition from MMDS where we are already in the process of trying to limit it significantly in the package it can provide and trying to create a fair basis of competition. And here we are talking about opening it up to an entity that in the parent company remains the third largest corporation in the United States, and the seven subsidiary companies are in the top 35 corporations of the United States.

There is great difficulty obviously in separating who is supporting what activity and where the capital for that activity is coming from.

In addition, not even requiring a franchise fee or process to be charged with the same kind of leverage that that has for the various programming interests which we have expressed are of great importance to us in permitting this kind of franchise to exist.

Now I wonder if you would comment on that?

Mr. COLLINS. Well, you have given me about ten items there. Let me pick out a couple of them, if I may.

The first is that we operate, as others have said, a lot of regulated and unregulated services. They are audited extensively. They are audited every year internally. They are audited every year by our attest auditors. We have just completed ours, and there were no faults found.

I believe that the FCC and the State regulators can be depended upon to check that.

Now the other thing is that there is substantial risk to us in undertaking the cross-subsidy actions. There are fines that have been imposed in NYNEX, and, in fact, there are criminal penalties possible.

Now on the franchise issue I know that there is concern that there is a franchise charge paid by cable companies, and there may not be an equivalent charge paid by telephone companies. Let me suggest to you that we pay gross receipts taxes in many of our jurisdictions. We pay special regulatory fees whenever they have a rate case or an investigation. In D.C., for example, every time we have a rate case we pay the Public Service Commission to do that investigation about $1.6 million. We have special permit fees when we open any streets or manholes. Actually, I think we pay higher property taxes than others do who provide like kinds of services.

In total, I am sure the telephone companies are carrying a larger burden in taxes than the cable companies are.

Senator KERRY. That is not the leverage that is exerted by communities obviously in the franchise process itself in order to exact a certain kind of programming standard. I mean, that is really the difference.

Mr. COLLINS. Senator, in many areas where we provide poles and conduit we have to make duct or pole attachments available to the city, and they have negotiated with us over the years a number of things for their city governments.

Senator KERRY. I will end on this because I know Senator Gore has an appointment to which he has to go, and I do not want to delay him.

If you are providing a fiber and on that fiber you can carry telephone, other information services and video and you have interactive capacity, once you are able to provide all of that in that way if we were to permit it and you have access to programming similar to the programming—which I think is currently what is on the table, that you are going to grab some of the same programming available to the cable industry—why would anybody want to subscribe to cable?

Mr. COLLINS. I would hope that our entrance would not be just a "me, too" kind of thing. We would expect to introduce new capabilities and new programming. We think if we put a common carrier network in and we operate that and we have an incentive to do that, we believe other information providers will use that network. We believe it is like the PC market. We do not know what is going to go on in the market, nor did people know what went into the PC environment when that was developed.

I just believe that we will bring another dimension to the whole equation.

Senator KERRY. You sure will. There is no question about that. The question is to what degree that dimension creates an equal playing field or to what degree that dimension becomes a new monopoly.

Mr. COLLINS. Well, Senator, we have an obligation as telephone companies to provide the access to that common carrier network to cable companies if they choose to use it or to any other programmer. What we are offering is the smaller programmer will be able to use it on an as-needed switched hourly basis. We think that is an option that this country deserves and which our consumers deserve.

Senator KERRY. Well, I understand that. It depends again maybe on the barriers and on the firewalls and other things that may or may not be potential here.

I am concerned about what I read in Mr. Gillett's testimony about GTE's brochure where it says now imagine that all these services were brought to you by a single company, a company that offered telephone, date and video transmission over the same network to your home with one bill to pay. That seems to me to carry the impact of something far more significant maybe down the road. It may not be the first step here.

You know, I just think we have an obligation here to try to think about the levelness of the playing field and the degree to which we can protect that. I am not sure we have a terrific record at being able to do that. I do not know the answer to this. That is why I am dwelling more on these questions rather than on the cable side of it.

Mr. **Collins**. Senator, I think you have a very legitimate concern. You are trying to balance the risk of the safeguards not working as opposed to the risks of the loss in diversity of choice that the telephone companies bring to the game.

Our conclusion is that the regulations and the safeguards that we propose and which have been adopted would minimize that risk.

Senator **Kerry**. Well, we need to examine that.

I thank you, Mr. Chairman. Thank you very much.

Senator **Inouye**. Thank you.

Senator Gore.

Senator **Gore**. Thank you, Mr. Chairman, and thank you, Senator Kerry, for your courtesy in letting me move ahead here. I apologize for not being here at the very beginning of the hearing. Sometimes it seems like especially on Wednesdays the schedule gets very tough with the different committees. I am going to have to leave, but I intend to come back for the second panel as well.

I have read your statements and followed your arguments here very closely. I want to thank you, Mr. Chairman, again for scheduling a full panel on the issue of telephone company entry into cable as a part of this series of hearings on the cable legislation.

The bill I have introduced with my colleagues, Senators Ford, Gorton, Danforth and McCain, would reduce the cable-telco cross-ownership area as well as establishing protections against cross-subsidies and anticompetitive behavior by the telephone companies.

I recognize there are legitimate questions, many of which have been pursued here this morning already, but I am convinced there are several forms of potential cable competition that could help keep rates reasonable, service at a high level, and still foster new programming opportunities for consumers, satellite dishes, wireless cable, new direct broadcast satellite systems and other cable overbuilds.

The telephone companies with a potential for extremely efficient high capacity fiber networks into the home can be a major part of that competitive mix.

Certainly, as I said, there are serious problems facing regulators if telephone companies are allowed unfettered access to the cable market. I do believe it is possible for this FCC to construct adequate protections.

Now while changes in the cross-ownership prohibitions are not now a part of the staff legislative draft, I am looking forward to working with the Chairman and my colleagues on the committee to consider language which will introduce local competition by allowing telephone companies to provide cable services.

I have a few brief questions and others for the record. I must confess I cannot resist asking you a question, Mr. McLaughlin. When I came in the hearing room, somebody said, Senator, you will not believe what that guy just said in there. I am told that Senator Ford took you on pretty strongly, and I do not want to belabor the point.

I do want to defend the name of Harvard University because your views, with all due respect, strike me as much more in keeping with the University of Chicago School of Economics.

This one statement here we should recognize that much of today's interstate highway structure would have been built without the Federal program. Most of the most critically and heavily traveled routes were built as toll roads before the Federal program started. That is just not so. That is just not so. There were not any in my state of Tennessee.

Now, maybe Tennessee is not critical in your view, and maybe just the northeast corridor between Boston and New York is critical but, boy, that is really going off the deep end in my opinion.

Senator KERRY. This just goes to underscore how difficult it is for me as a Yale man to represent Massachusetts.

Senator GORE. Where did you go the second two years?

Senator KERRY. Harvard.

Mr. McLAUGHLIN. Senator Gore, do I get a chance to defend myself?

Senator GORE. No. Only if the market allows it.

Of course you do. Please go ahead.

Mr. McLAUGHLIN. You will note I said heavily trafficked.

Now, first of all, I do not know. I happen to think that Tennessee would have built a lot more highways if the interstate highway program had not come into being.

Senator GORE. With all due respect, that is just silly, really. I mean, seriously, do you know what interstates go through Tennessee?

Mr. McLAUGHLIN. Yes. With a son at Vanderbilt, I do.

Senator GORE. Well, very good.

You are redeemed a little bit.

But you have Interstate 40 running east and west, you have Interstate 65 running north and south, you have Interstate 24 running southeast to northwest. You have other interstates that also come into the state, and let me tell you, I watched that program develop by chance. When I was growing up, my father was the chairman of the subcommittee that wrote the legislation, and I watched it as a child, and the fact is before it existed it was a mess. It was a real mess.

And if it had not been built, the idea that the market system would have done that is really—I mean, come on, you do not really believe that.

Mr. McLAUGHLIN. Senator, let me refer you—since you were not here at the time—back to my testimony.

Senator GORE. I have read your testimony.

Mr. McLAUGHLIN. I like the interstate highway system, and I am not arguing against the interstate highway system.

Senator GORE. Where is that in your statement?

Mr. McLAUGHLIN. It is there, and the interstate highway system——

Senator GORE. Oh, you say many people seem to like it.

Mr. McLAUGHLIN. Well, I think it has served a good purpose. It certainly got me from New Jersey to Virginia quicker. I happen to think and I am simply saying and perhaps you are proving my point—I am simply saying gee—and I do not mean this even to sound resentful—you got more than your share, but maybe that is because your dad drafted the legislation, too. Tennessee probably got more interstate highway than it deserved.

And, having been an elected politician myself at one time, I certainly think you ought to be taking that as a compliment and not an insult.

Senator **GORE**. Mr. Chairman, let me just say that I think Mr. McLaughlin as the cable industry's primary defender in this hearing is stating views that I want all my colleagues to give ear to and listen to. Cable is putting its case here to the committee.

Senator **INOUYE**. I just want to remind you this is the Communications Subcommittee and not Public Works.

Senator **GORE**. What about water lines? Are you against building water lines? Do you think we ought to leave water and sewer lines to the private marketplace?

Mr. **MCLAUGHLIN**. Senator, again, if you read in there I talk about public good and those things we all agree to. I am certainly not here to defend the cable folks, by the way. And I do not care if you let the telephone company people into this.

Senator **GORE**. Wait a minute. But I want to ask——

Mr. **MCLAUGHLIN**. Wait a minute. Let me talk to water. Someone else is talking about fiber optics.

Senator **GORE**. I want to ask you about water. Would you say that we ought to leave the construction of water lines to private industry and the market system?

Mr. **MCLAUGHLIN**. Well, actually much of that was done by private companies in this country.

Senator **GORE**. Not in rural areas, not in the smaller towns.

Mr. **MCLAUGHLIN**. We decided a while ago that we were going to make that more public. I am simply saying the whole idea—and Senator Packwood was talking about fiber to the home at this stage, and what we use it for—is like putting a 50-inch main instead of the one-inch main that you have running into the house right now.

Senator **GORE**. But let me just ask you the question again. Do you think it is a mistake for the Government to build water and sewer lines?

Mr. **MCLAUGHLIN**. No, as long as that is what the body politic has decided they want to do.

Senator **GORE**. So what justifies it is whether the people—so we can validate any of these decisions by voting for them?

Mr. **MCLAUGHLIN**. Of course.

Senator **GORE**. Well, what is the point then? I mean, do you think it was a mistake? You think it is okay as long as people want it?

Mr. **MCLAUGHLIN**. Of course.

Senator **GORE**. Well, the people wanted the interstate highway system, and you are saying that was a mistake.

Mr. **MCLAUGHLIN**. No. I say we probably put more of it in rural areas than you would otherwise. That is what I said.

Senator **GORE**. Well, I said I was not going to belabor the point, and here I am getting close to doing that.

You know, there are so many differences between the United States and the Soviet Union, you cannot really compare, but one difference in addition to our commitment to freedom and our system which unlocks a high fraction of the human potential—another difference is that we have chosen to maximize the use of our land and our territory and our resources whereas the Soviet Union concentrated what wealth it has in its cities and in the vast area between its cities it is just a mass of poverty with no development and no resources and no wealth at all. And they still call them peasants. That is what they call them, peasants.

And by contrast the United States made a decision with the Homestead Act and with the TVA and with the decision to build the railroads and with REA and with the interstate highway system to make it possible for people to live in the great expanse between the few dozen large cities that we have and as a result we have maximized the usefulness of our territory and our resources and have achieved great economic strength and wealth.

And, in fact, infrastructure does now have to be looked at in terms of the information age, so I think your statement really speaks for itself, and I just could not resist getting into a little bit.

Let me just quickly move to some other areas and feel free to comment on this, Mr. McLaughlin, if you wish.

Is it not true that a state-of-the-art cable system in an average small to medium-sized town costs around $600 to $900 per subscriber? Is that the figure you would use, Mr. Gillett?

Mr. GILLETT. I would use more like the $600.

Senator GORE. $600 per subscriber. What are they selling for per subscriber now?

Mr. GILLETT. I do not think there have been any sales recently, but the ones that were over past I think were in the $2,500, $2,200.

Senator GORE. Is it not kind of interesting that a cable system will sell for three or four times the price per subscriber that it cost to build the system. How do you explain that?

Mr. GILLETT. Well, I guess I look upon it as the fact that you are buying obviously more than a physical asset of what our network can do. You are buying the distribution to a home just like——

Senator GORE. And what else? What else are you buying?

Mr. GILLETT. In many media businesses I think the physical assets do not come anywhere near close to the actual purchase price. I think if you are going to buy, for example, a T.V. station, the physical cost of a T.V. station is extremely low, but the purchase price of a T.V. station is extremely high, and I think that would be a more logical comparison.

We happen to do our distribution physically.

Senator GORE. But what are you buying? Let us say you and I go into business together and we want to buy a cable system, and we look at the market, we look at the town, and we say it has 1,000 subscribers. We say it is going to cost us $600 per subscriber to build it so we can put it in the ground and put it in place for $600,000. Then we say well or we could buy the one that is already there, but that would cost—what was your number? $25——

Mr. GILLETT. Three or four times as much.

Senator GORE. You said $2,500 per subscriber, so we could say we could spend $600,000 to put it in the ground or we could spend $2.5 million to buy the one that is already there. Why would we not save all that money by spending the $600,000 instead of the $2.5 million?

Mr. GILLETT. Well, presumably following the statistics in the United States, the one you are thinking about buying has 60 percent of the customers already being served and is passing 90 percent of that town, and so you have in place a loyal customer base that is already established, and so as opposed to coming in with a speculative venture or overbuilding and attempting to win market share against that existing supplier, you are saying the alternative is probably well, maybe it is a better alternative to in fact purchase the existing that has the existing customer base.

Senator GORE. Now, is it just a matter of customer loyalty? is that what it is?

Mr. GILLETT. Or established customers. I mean, you have an established customer base. You are serving a certain number of customers now.

Senator GORE. You have an established monopoly, right?

Mr. GILLETT. Well, you see, I happen to disagree with that. I do not view video services as a monopoly.

Senator GORE. We have an overbuild going on in Tennessee right now. We have the Multivision case there, and in one community because it got a lot of political notoriety and a lot of attention and other people in the cable industry went to Multivision and said what are you guys doing? You know, you are giving a bad name to the whole industry.

We are going to get together. We are going to encourage somebody to come in and overbuild. Otherwise it never would have happened, but they came in and overbuilt.

You know what the rates have been for the last three months there?

Mr. GILLETT. No.

Senator GORE. Zero, free cable television service. Do you think that is an anticompetitive practice?

Mr. GILLETT. I do not know enough about——

Senator GORE. Are you an economist?

Mr. GILLETT. No, I am not.

Senator GORE. The object is they want to drive the overbuild company into bankruptcy. It is not complicated. It is a natural monopoly and the reason why systems are selling for two, three, four times what it cost to build them is there is no competition, and it is a natural monopoly and they use their leverage to drive the competition out of business.

So, what is being bought that cost so much more money is the monopoly rent, the opportunity to earn monopoly profits. Now, that is why I think telco entry could provide local competition and restrain this runaway speculation that is counterproductive and anti-consumer.

Mr. GILLETT. Senator, could I just comment on that last part—that although—and I understand your theory of improving the competition on cable—I think what is another obligation of this committee is to consider the cost on the telephone customer for allowing that competition to occur because you do not have, I think, the opportunity for a single decision. It is the decision of how do you serve America for telephone service, how do you serve American for cable service, and how do you provide these information services that we hope in fact we can finally deliver to our country, and they are not independent. It is contention that, in fact, the cost of using the networks the telephone companies are thinking about to compete against us and rectify the problems you just describe is, in fact, going to be subsidized by all the telephone payers.

Senator GORE. Well, unless there are protections against cross-subsidies—and one of the main questions that has to be resolved before this measure can go forward is the protections against cross-subsidy have to be in place. They have to be effective, they have to be believable, they have to be real. And I agree with that absolutely. And there is also a legitimate question about whether or not that is completely possible. I happen to think it is.

I also believe that the other questions you have raised are legitimate, and I think that they should be explored. I think the benefits of doing this are so great we have an obligation to try and answer those questions positively.

And one other question before I close. You have implied that a failed fiber venture by the telcos would bring about a taxpayer bailout.

Mr. GILLETT. No, I did not say that. Your friend from Harvard said that.

Mr. MCLAUGHLIN. I think Senator Packwood said that.

Senator GORE. Mr. Gillett, are you distancing yourself from Mr. McLaughlin?

Did either you or Mr. Verveer imply that this would bring a taxpayer bailout?

Mr. VERVEER. Senator, it is certainly my view that a significant failure on the part of the telephone industry with respect to this kind of diversification or any other kind of diversification ultimately will bring the taxpayers into the contest, that is right.

Senator GORE. Now when cable speculates in cable buyouts at inflated prices and then gets into trouble financially, do the taxpayers bail them out?

Mr. VERVEER. Not that I am aware.

Senator GORE. Why is it different? Why would it be different if the telephone company did the same thing?

Mr. VERVEER. Senator, the difference is precisely the difference between the telephone industry and the cable industry. The telephone industry offers an essential service. It is not acceptable for our society to see the quality of telephone service deteriorate in any significant way. As a result, any serious monetary problem that a telephone company gets into is going to inevitably require us as a society to rescue that telephone company.

Senator GORE. I do not follow your logic at all.

If the telephone company gets into the cable television business and it runs into financial trouble and that venture does not make it, do you think they are going to come up to Capitol Hill and ask for a taxpayer bailout; and if they did, do you think the Congress would say okay?

Mr. VERVEER. Absolutely, Senator. If the capital structure of that company is impaired, and there is no way to isolate the diversification activities from the broader capital structure of that company, they will come here, and I believe that the answer will be that, yes, as a society we have to help them out.

Senator GORE. I respect your views. I respectfully disagree with them very strongly. I do not see how or why that would happen.

I guess you are assuming that there would be no protections against cross-subsidy back and forth that I have said earlier and others have said must be a part of this.

Mr. VERVEER. Senator, if I might, this really goes beyond the questions of cross-subsidy. I am very skeptical that we can successfully devise means to prevent cross-subsidy so long as we subject these telephone companies to cost of service regulation; but this really goes beyond that.

This could be a completely nonsubsidized activity. It still is going to be part of the capital structure of the larger company, and if it fails and fails in a major way, that capital structure is going to have to be replenished.

Senator GORE. I tell you, I think the telephone industry as a whole is so competitive now that you would find in a situation like that a lot of people anxious to come in and take over. I see some people who are licking their chops over there right now. If somebody created a situation like that, there will be no call, in my opinion, for taxpayer subsidy.

I want to thank my colleague, Senator Pressler, for allowing me to go first.

Mr. Chairman, I will be back for the second panel. Thank you.

Senator INOUYE. Senator Pressler.

Senator PRESSLER. Thank you, Mr. Chairman. I think many of the questions on my mind have been answered, but there are one or two more here that I just want to briefly touch on. I will address this to Mr. Gillett, if I may.

You argued that everyone in the country can get all the video services he wants over existing technologies. You mentioned satellite delivery where cable is not available.

Do you think that cable has the right to deny its programming to alternative technologies; and if so, does that contract your statement on availability?

Mr. GILLETT. A right to deny programming?

Senator PRESSLER. Yes. If cable does deny its programming to alternative technologies.

Mr. GILLETT. I am assuming that programming, from whatever source, is available to any network to be able to deliver into these homes, whether it is via satellite or physical networks of ours or somebody else's or over videotape, for that matter.

Senator PRESSLER. I might address the second question to Mr. McLaughlin or anybody who wants to respond to this. This is the dilemma that I have. In a lot of these issues coming from primarily a rural small city state, I find myself constantly fighting for, let us say, universal telephone service. I am concerned about the long distance rates in smaller towns and rural areas, and I do not want to hold up new technologies in the suburban areas with requirements that other areas be served.

I believe, however, that our Nation, our national transportation system and our national communications system, was built on a basis of the 1932 acts, in common carriers that if you have some rich routes you take some poor routes to help spread economic development.

When people talk about deregulation or service, they are talking about the rich suburban areas. That is what they want to serve, really. They do not want to serve the inner city or the rural areas, really. They do take some of that public responsibility, however, and sometimes the government has to step in and take an extra step.

For example, our farmers and ranchers in South Dakota have not gotten cable TV. Now someone can put up a dish, but the REAs have come in with microwave service and gotten six or seven channels for some of them. That is a step forward, but there is a real dilemma there in that when we talk about any of these issues, if someone lives out far away from a city should he be able to pick up a phone and make a long distance call at a rate that is the same as somebody in the city? Obviously somebody is long money on that.

From my state's point of view, the answer to that is yes. So I am constantly fighting companies and for legislation to help rural and small town people. It is the same in upstate New York. I suppose it would be the same in Hawaii or Alaska or Montana.

How do we resolve this dilemma of providing that universal service without holding up new technologies?

Mr. McLaughlin. Well, let me take a stab, and let me say I think that I can appreciate the dilemma.

I also think in this particular case the answer may be easier than in each of these things that you have cited before, things like cable TV and telephony. We knew there was a market, or we knew after they had been around for a while and businesses started using them and then, if you will, richer suburban or urban communities started using them. We knew there was a market there.

I think if we start talking about things like fiber to the home where we do not know if there is a market, we can let the market do some experimentation.

Now I want to make clear. I am perfectly indifferent as to whether or not you want the telephone companies to go into this market. I am not sure it is a good business decision on their part, but I am simply saying I do not think there is much of a market there at the moment. Let some of those rich suburban or urban communities experiment and see if people are willing to pay money in a commercial market for those services before we decide to obligate or to encourage spreading them into every corner of the country.

Whether we do this next year or three years from now I do not think is a crucial national decision. I think there is one issue remaining. I am sorry Senator Gore had to depart. When he described the Multivision overbuild, on about three occasions, whether consciously or not, he used the term "natural monopoly". Now whether this is or is not a natural monopoly, I will not get into a debate. If he thinks it is, the answer there is that only one company can make money doing it. The second company is always going to go out of business.

Now that is why I am suggesting what we know of the market right now is the key issue here. Again, I am indifferent as to whether it is telephone or whether the cable company, but given the current market demand I do not think there is money out there to support both of them.

Mr. Collins. Senator, Bell Atlantic has a large area that is rural in nature down in southwest Virginia and the western part of

Maryland and West Virginia and Pennsylvania. We have in almost all of those areas carried the backbone fiber networks from the heavy metropolitan areas down into the local switching machines in those areas and would be prepared to extend it further.

We will not realize the benefits of the scale of operations and the efficiencies of the data base kinds of management systems unless we get fiber to all of those locations and to all of the connections to those central offices over a period of time. It is a long process, but we are a common carrier, and we are obligated to bring those technologies in on a planned basis.

Frankly, the incentive for us to do that is there because, as I said, our big operating systems, our purchase of basic equipment depends on volume and uniformity, and those two things require us to equip rural America. That is our direction.

Senator PRESSLER. Thank you. I know you have done a lot of work in that area, and I congratulate you on it.

Mr. GILLETT. Senator, I happen to believe that you are hitting in an area that is exactly what I would recommend as the priority of where we should be investing in America's telecommunications infrastructure.

You know, we are seeing fiber optics and the value it can have at the points in the network that were just described. It is interconnecting central offices, and that is working whether you are in rural America or in other areas of the United States, and it can be accelerated into rural America. So fiber can come to the central office serving any town in your state. Those central offices are probably being converted over to digital central offices.

The issue tends to be more how to get the customer to get access to the power of those fiber networks. It is our contention that, in fact, that existing copper plant can be used very efficiently to get multiple services through that plant from the home to the power of that fiber network. So, in fact, in your cities or around the beltway around Boston can all have the access to the same kinds of services.

Our emphasis, in my opinion, is in the wrong place. It is in making the backbone of the network have the high efficiency, the high technology, the access to the services at that point and then making it easy and cost effective for the home to get to it. That is going to work anyplace in America.

Mr. COLLINS. Senator, I believe that implied there is an overstatement of the capability of the copper from the central office to the home. I would like to assure you that if the copper could be made to perform as well as fiber we would not take the copper out, we would only put the fiber in when it is needed.

Senator PRESSLER. Yes, and as my friend, Senator Burns, has pointed out so eloquently, this is the only way that some of this type of information is going to get to the small school or small town if it is done right, and I think I heard him speak to that.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

When the staff was instructed to come forth with a draft incorporating the many concepts and philosophies that have been presented by Members of this committee, we came up with this draft knowing that it would evoke much controversy.

I wish to advise all of you that we are going through this exercise with an open mind. As I said in my opening statement several days ago, if I had to draft a bill it would not be the one before us today, it would be something different. I think all of us are in the same category.

So I just wanted to make this statement to assure you that your discussions today will weigh heavily upon our decisionmaking progress.

Having said that, I would like to refer back to a statement I believe Mr. Foster made, that it is not your desire to receive authority to involve yourself in a "me, too" type of operation or to provide duplicate services.

Is that correct?

Mr. COLLINS. That would not be our primary goal. We would like, and we bring to the table, a new set of information service alternatives.

Senator INOUYE. All right. Now what services or technology are presently not offered by cable and not offered by the telephone companies because the law prohibits such offerings? Can you describe those services or technology which you could provide if we amended the law?

Mr. COLLINS. I will give you a couple of examples, and maybe Mr. Foster can help with this. I used an example in my testimony, the interactive nature of students at home communicating through a two-way arrangement, a video arrangement, to learn foreign languages. That is a service that we believe we could offer that is not there today. The interactive two-way switched common carrier network is not available today. We offer to put that in place.

We offer to develop——

Senator INOUYE. You have the capability to do that now?

Mr. COLLINS. We do. We would like the right to assure that programs are developed in addition to those that are available on cable. That would make that network viable for us from a financial perspective. We believe we can do that, and that is one service.

There are medical services, educational services, shop-at-home services; people might even want to look at a hearing like this and use zoom cameras to look at different individuals, to look at the text of the transcripts here, to look at the testimony that is being written. There are all kinds of services that we believe the public is interested in and deserves, and we would like to participate in bringing those to the consumer.

Senator INOUYE. Mr. Foster.

Mr. FOSTER. Well, there are a number of applications. One is video on demand, a service we are testing now in Cerritos. Basically, that involves the consumer deciding what he wants to watch and when he wants to watch it and being able to access that particular video when he saw fit. You also delay or see things when it is appropriate for the individual.

For example, if CBS wanted to offer over our network consumers access to their evening news. When you come home you could start CBS Evening News when you are ready to watch it. You could stop it if you had to leave the room, and you could come back and start it again. So it is being able to select from a library of videos, first-run videos from new types of services that Mr. Collins just mentioned. It is that whole array of services that would ensure that we are not "me, too."

I do not think it is wrong even in providing competition for cable TV on the basic services they offer today, also, because, in effect, under the Cable Act of 1984 we were precluded from carrying that traffic over our network. So in effect what happened is our network was denied the benefits of the cost reduction for all of our services that would have occurred had we been able to carry that additional traffic.

So all we are asking for is a shot at open competition here so that we can compete for some of that traffic, and, therefore, the cost per unit for all of our services would be lowered.

Senator INOUYE. What if the bill were amended to give the authority to provide those services that you just described, and nothing more?

Mr. COLLINS. You would draw a line between traditional cable entertainment services and these new, innovative, two-way interactive services we are talking about?

Senator INOUYE. Yes.

Mr. COLLINS. Senator, drawing arbitrary lines like that moves the battlefield from one stage to the other. And I think we would create another set of disputes. I can understand, from your perspective, that might offer an alternative. But I think we would then have a dispute whether a service was a video entertainment traditional service, or whether it was a new, innovative service. And we would have to have somebody to resolve those.

Senator INOUYE. The FCC?

Mr. COLLINS. The FCC might be the place to put that.

Senator INOUYE. With that provision, you would be satisfied?

Mr. COLLINS. No, I would like the opportunity to be in the full-service cable market. I believe I offer an opportunity to provide entertainment.

Senator INOUYE. Are you going to provide CNN and TBS and MTV and all of that?

Mr. COLLINS. Yes. Because I believe any time you draw an arbitrary line, you are not going to allow technology to develop to its fullest extent. You are going to partition the services and the players in the game, and I do not believe that is what this country needs.

Senator INOUYE. Then, in essence, what you want to do is set up another cable company for a community?

Mr. COLLINS. No, I did not say that. I said I would like the opportunity to do that, because I believe competition, even in that basic cable company, is worthwhile for the consumer.

Senator INOUYE. Mr. Gillett is getting nervous there.

Mr. GILLETT. I happen to think that the scenario you are starting to paint makes a lot of logic for our country. There are, again, two megaservices, at least I would call them megaservices, and that is talking on your telephone and watching television. And each of those are so different in their nature and their characteristics of a two-way, point-to-point-type network or a broadcast-type of network.

Trying to put them onto one network is going to make a network that does not do either one of them very well. To me, there is some logic in saying we have an industry line right now that is optimizing how to serve television-type services to the homes of America. And we have an industry that is supposed to be optimizing how we serve telephone service to this country.

And I believe there is a tremendous opportunity for those two industries to in fact work together on now what is coming forth, and that is information. Because, between the two of us, we can deliver any service you have described today, or any of the answers that our two telco friends to my left have in fact suggested.

So I think there is opportunity for us to continue focused attention to serving better, higher-quality, and at a lower-cost the existing services that America definitely wants to do, as well as putting in place opportunities to grow and make these information services happen in a cost-effective way.

Mr. **Foster**. Mr. Chairman, if you are saying would we be willing to not participate in the existing video programming, such as CNN, HBO, does that mean that we would be able to develop our own CNN and our own HBO in conjunction with others? Because if you are not, what you are saying is we need to have a regulated cable monopoly over there.

But if you are looking for competition, then free us. And if you say we cannot use their sources, but we can develop our own, how could the customer not be served by that?

CNN would have never been developed if that competition was not allowed to flourish.

Senator **Inouye**. What you are suggesting is that you be given the opportunity of presenting a format of services that is not presently offered by cable?

Mr. **Foster**. No, sir, I was just trying to clarify the case you were hypothesizing. Because if you are hypothesizing what I just said, that would certainly be a lot better than what we have today.

My view is, we should not legislate what anyone can and cannot do in the marketplace. We really should try to create a fair, competitive environment. We should not create another regulated monopoly that is highly vertically integrated. We should open it up to competition.

But, certainly, if we would be permitted to do the latter, it would be certainly better than the current draft legislation, by far.

Senator **Inouye**. Adding another dimension to this, I would assume that one of your services would be providing newsprint so that I can turn on a channel in the morning at my breakfast, drink my coffee and watch the news in print. Is that one of the services?

Mr. **Foster**. I have no idea. It depends on what the customer wants and whether the people who are providing this information want to market it over our channels. For example, if the "Wall Street Journal" decided it wanted to market through our network, and there was a market out there, and they wanted to provide that on TV, we would certainly support that.

As a matter of fact, that is the kind of cooperative ventures we are looking for, what does the marketplace want, and who can best provide it.

Senator **Inouye**. What is your response to the concern expressed by newspaper publishers that if you are given the authority to do what you are asking for, you would put them out of business?

Mr. **Foster**. Well, I think, quite the contrary, they could use our network to provide fresh news 24 hours a day. You see, today, they sell their information on paper and ink. They can sell it over our network, too.

As a matter of fact, a lot of them are using electronic sources as ways of increasing their income. We are not trying to get into the newspaper business. We do not want to develop movies. We do not want to be the source. What we want to be able to do is package material and work with people cooperatively so that the consumers can get access on a broad basis to a wide array of products and services.

But we are not allowed, under the draft proposal, to even package, or even cooperatively work with these newspaper publishers. And we do not intend to put newspaper publishers out of business. I do not think that is possible.

Senator **Inouye**. How do you respond to the concern that by packaging the Yellow Pages, you would put them out of business, because advertisers would find it better to go to your source than to their ad pages?

Mr. **Foster**. Well, if you are asking me, can we be assured that everybody who is currently in the marketplace is going to be protected? I cannot do that. I do not know the answer to that. I think the marketplace itself is going to determine the winners and the losers. And if there is a better alternative for the consumer, the consumer ought to have access to that, as long as everybody is playing fairly.

And I think that the newspapers have to be concerned that we play fairly, just like the public has to be concerned that the newspapers are playing fairly in their marketplace, also.

Mr. **Collins**. Mr. Chairman, I do not assume that the newspaper cannot compete. They have got a long experience of doing advertising. They put it on print now, I do not know why they would not rise to the challenge to put it on electronics.

And the other point I would like to suggest is that, in news and those kinds of services, we, as companies, have First Amendment rights, just like others.

Senator **Inouye**. I think statistics would suggest, and I do not have all of them, that in the past 50 years, more than 75 percent of our newspapers have gone down under. New York City used to have I believe a dozen newspapers, and today, three dailies. And I think that is the history throughout the Nation. And, for obvious reasons, they are quite concerned.

Now is it in our national interest to maintain a robust printed news media in the United States?

Mr. **Foster**. I think it is, Senator. And USA Today is a good example of how the new and creative can come into the marketplace and understand what their customers want, and gain enormous market share.

And I think that creative destruction that is going on in our society are the forces that made this country what it is. If we protect everyone where they are today, then we are assured of not serving the consumer's interest.

I think that newspapers are important, and I do not think there is any question that they are going to be there. The public is going to want newspapers and support them. But we are not responsible for newspapers losing all their market share and reducing the number. Because we were not in the video business.

So that has to be laid somewhere. In other words, there is a natural process occurring there. And if they are not serving their markets, they need to figure out why they are not serving and what they need to do so that they can adequately serve those markets.

Otherwise, stopping us from getting into the video portion of this business is not going to mean anything. They are still going to lose their market share. It is going to be something else.

Senator INOUYE. When cable was originally conceived, it was for the most part a transmission service. It carried local programs through valleys and mountains. And we decided to provide you with an opportunity in the 1984 Act to expand by deregulating this. What is wrong with giving the telephone company the same opportunity?

Mr. VERVEER. Senator, I think the problem of giving the telephone company the same opportunity is that it operates under a very different set of incentives from almost any other business in this country.

It possesses a monopoly, and it is subject to cost-of-service regulation, as it has been now for decades and decades and decades. It is the principal means of social control we have over the telephone industry, in terms of assuring that it performs, particularly with respect to price, but also with respect to quality and the way we want it to perform, and the way we need it to perform.

Companies that are subject to that kind of regulation have peculiar incentives when it comes to vertical integration. They have an incentive to integrate into adjacent markets, such as video programming, in order to evade the regulatory constraints on their core business, in order to recognize the monopoly profits that they otherwise cannot recognize in their core business because of regulation.

We are changing, to some very limited extent, the kinds of regulation telephone companies are subject to in our society, as I believe Mr. Foster mentioned. But it turns out that all of the regulatory schemes of which I am aware, except in Nebraska, retain as a principal element, this same cost-of-service arrangement that is the principal reason that telephone companies are a special case.

We put at risk anybody who competes with them when we let them integrate into adjacent markets. More importantly, we put at risk the dynamism, the progressiveness, in terms of those businesses, that we count on to serve consumers.

The phone companies are permitted today to offer much of the kind of competition they claim is needed for the cable industry. They can build fiber under the present sets of arrangements, but they have to make it available to independent third parties.

The argument that they have articulated today to you, sir, and to your colleagues, basically, seems to come down to, what if nobody showed up? What if we made this speculative investment that we persuaded our regulators that this was a sensible thing for us to do, and having made that case, we made the investment, and then nobody turned up?

There are I think two responses one can make with respect to that kind of argument.

First, it implies something that nobody has talked about here, which is the state and the incentives of the programming business. The last time that the government addressed the issues of what the video programming business, the production business was like, that I am aware of, was the Network Inquiry that the FCC had from about 1978 to 1980.

The conclusion of the scholars who ran that inquiry was that the production industry is a competitive industry, a highly competitive industry, not marked by significant barriers to entry at all, and with resources which are highly mobile.

The notion that that kind of an industry, looking for an appropriate distribution channel would come upon what the telephone industry is offering if the prices are right, if the terms and conditions are right, and not use it, is bizarre. It suggests a kind of behavior on the part of the programming industry that is just not known in terms of a capitalist economy.

So the fear that they want to guard against by entering into this business, with all the risks that we have just talked about to telephone ratepayers and to competitors, seems a very, very thin case, indeed.

The second thing that they talk about doing is financing additional programming. That it would be desirable to finance additional programming. And again, it certainly is desirable if more money can come into any industry, if output can be increased.

But we get back to the question I think Senator Kerry asked, which is where does that money come from? How is it that a telephone company has the ability to go out and engage in funding, whole or partial, of new programming?

And the answer, to some extent at least, or at least we have to wonder if the answer is not to some extent, that there has already been a regulatory failure. That the kind of regulation we have today, which is designed to give the phone companies enough money to build plant and operate the service effectively may have thrown off surplus capital that gives them an opportunity to invest.

But Senator Kerry's question was absolutely right. The only place that money comes from ultimately is telephone ratepayers.

So what we have ultimately is a real moral hazard situation. Again, an artifact of public regulation of the type that is very traditional in our society, and indeed, to some extent, in England as well.

And in the face of that moral hazard, it really would be very dangerous, and I think wrong, to let the telephone companies into the content business, not just with respect to cable or video programming or television, but more broadly.

Mr. FOSTER. We invest in future businesses based upon what we think we can earn in that business, not on what we have earned in the past, and our regulators have done an outstanding job, I think. As a matter of fact, in some instances they have restricted us to the point where we have hardly earned an adequate return.

But if you think that we have been so overearning, I hope you have been investing in telephone company stock because I do not think the telephone companies' properties have appreciated nearly at the value the cable T.V. companies' properties have appreciated.

So if there has been an area where there has been overearnings, I do not think the telephone companies would be the ones where you would really want to focus first. Future investments are based upon what you think they will earn or what you have earned in the past, and I do not know where this economic theory is coming from here, but it certainly is not taught at most universities.

Mr. COLLINS. Senator, the revenues that are paid for the services we deliver for telephone service, those revenues belong to the stockholder, not to the ratepayer. The ratepayer has received service. He has paid for it. Those revenues then are available to the stockholder to reinvest in the telephone company or in other ventures.

I do not understand this theory that that money once paid to the stockholders still belongs to the ratepayer. They are not overpaying for service. The regulators have assured that they have not overpaid for service.

Senator INOUYE. Is not the return to the stockholder limited by law?

Mr. COLLINS. Yes, it is, and those revenues or those limited revenues that belong to the stockholders, then the stockholder has a right to put them in programming, overseas investments or back in the telephone company.

Senator INOUYE. Income in excess of the dividends, what do you say of them?

Mr. COLLINS. Well, of the entire earnings from the telephone operations, only a portion of it in most companies is paid back in dividends to the stockholders. The rest of it, the stockholders leave with the company to reinvest, and that is fundamentally what we are talking about here.

Senator INOUYE. Mr. Gillett.

Mr. GILLETT. Two points and one that I would like to talk specifics. I think we have seen this in Southern Bell's filing in the depreciation case in the states in the south. They are requesting to accelerate the depreciation of their telephone plant; i.e., increase the expenses paid to them by their telephone ratepayers so they can provide broadband services.

I think it is very important, you know, for you and your committee to consider whether that is right. If I am using my telephone service is it right that part of my dollars are going to the telephone company so they can provide video services? I would contend that that is not right.

Mr. FOSTER. Mr. Chairman, I would just say that we have been providing enhanced technological capabilities to provide services. We have gone from narrow band to broad band 20 or 30 years ago. We had to recover the capital in obsolete technology. That has been an ongoing process that is monitored by both the FCC and all 50 state public utility commissions. They have no desire to see us make plants obsolete and have the ratepayers pay for it unless there is economic justification that the consumers are going to be better off, and that is monitored every step of the way.

Mr. Gillett participated in a proceeding that just guaranteed that that process would occur. There is nothing wrong with putting in new technology. The issue is why are you putting it in and is it justified. In every instance we have to justify it.

Senator INOUYE. Does economic viability require you to put the cable people out of business?

Mr. FOSTER. No, it does not.

Senator INOUYE. The investment that I have been told you must make is a horrendous one, anywhere between $150 and $400 million, and the return per year would be less than $20 million.

Mr. FOSTER. Well, that is based upon the Harvard School of Economics.

Senator INOUYE. Those are based upon statistics that are presently available?

Mr. FOSTER. No one knows what the network is going to cost to evolve because that depends upon what happens and how it happens and under what terms and conditions and what the consumers want. But we each year invest enormous sums of money to keep the network viable, and those investments are going on, as I said.

In two years 50 percent of all of our equivalent miles will be in fiber. So that is occurring right now.

Senator INOUYE. If we amended the law to your satisfaction, how much would you be investing? How much more would you invest?

Mr. FOSTER. We would approximately double our fiber penetration.

Senator INOUYE. How much would that cost nationwide?

Mr. FOSTER. I cannot speak nationwide. We spend about $2 billion a year in GTE for all of our capital investment. About a third of that is for what we call the outside plant that connects our central offices with the consumers.

As I said, we are going more and more to fiber every day, and in two years we will be at 50 percent penetration, but that those last miles are the ones we are talking about here, and we will double the rate of penetration and so if, for example, it would have taken ten years or 15 years depending upon which company you are talking about, our estimate is you would cut that in half.

I do not know if Mr. Collins might want to add to that.

Mr. COLLINS. We would see if we get the appropriate relief and the encouragement from the regulators and Congress that we would increase, double at least double the construction program over the next few years to bring the technology in.

The technology is going to reduce the cost of providing services today and add feature and function and, by the way, give the customer additional choices and control over what he gets at home. We think that is a plus, plus.

Mr. HUNT. Mr. Chairman, the comment was made earlier that we want to increase the depreciation. I cannot speak for these gentlemen, but I do not want what I own to depreciate, but it is anyway.

What we are talking about is accounting for the depreciation that, in fact, exists.

Mr. GILLETT. I think, Senator, that an interesting point that was made—and I happen to agree with it—and that is this quote: "No one knows what it is going to cost," and that is absolutely true.

You know, what we have is a prediction of potentially some customer somewhere in America might want some services called information, but what it is going to cost us to provide that we do not know.

I really believe that perhaps I should not use an analogy as backwards as Mr. McLaughlin's, but I will forward anyway. I think we are putting the technology cart in front of the market horse. Let us find what those services are and let us find what the right technology is to provide it and understand what those costs are. No one does know what those costs are yet, and no one is sure what those services are yet. Yet, we could be offering them to America today to find out with some objectivity what potential is really out there.

Mr. McLAUGHLIN. Mr. Chairman, I do want to straighten the record out here and perhaps Mr. Collins would help me.

I believe it was Mr. Collins' CEO who in a speech not long ago used the $450 billion figure. Is that right?

Mr. COLLINS. That is our estimate, yes.

Mr. McLAUGHLIN. So, to have Mr. Foster suggesting $100 or $150 may be an overestimate I think is simply disingenuous.

Mr. FOSTER. I did not say that, Mr. Chairman. All I said is we do not know how much it is going to cost. We are spending a lot of money each year today, and that is going to occur whether this legislation is modified or not.

Senator INOUYE. Well, the figure of $200 billion was provided us by one of the highest ranking officials of Bell, and he said that it would cost an additional $200 billion to set up a nationwide broad band system.

Mr. COLLINS. I will accept that for the sake of discussion, and you are using today's revenues to compare against that $200 billion, Mr. Chairman.

I believe that the services this country will use will produce the revenues necessary to cover that investment. We are going to do this investment on a year by year basis, and if the revenues do not develop, that network will not be deployed.

Senator INOUYE. Do you believe that this bill as drafted serves as a disincentive to building a robust industry that can compete worldwide?

Mr. COLLINS. I will tackle that one too, Mr. Chairman. I do not believe it is as much a disincentive as it is not enough incentive for us to go forward. So I would turn it in that direction.

I believe if you remove some of the additional restrictions that are not addressed in your present draft that you will encourage more rapid deployment and more development of services and more customer choice and more customer control.

Senator INOUYE. Gentlemen, I thank you very much. I wish I could sit here for a couple of more hours, but some of us have other assignments that we must respond to, and so we will be submitting to you, if I may, questions of a technical nature and request that you respond to them.

I thank all of you for participating in this discussion because obviously it is very important to all of us.

One of the major questions we will have to address will be whether telcos get into the act. And, as you can see here from the discussion, it may be a close call. And so I will keep the record open to permit all of you to add to your statements, provide supplements or addendum or clarifications, and you may look over the transcript and make corrections if you wish to make certain that we have the best record before us before we make our decisions.

I would like to at this moment apologize to panel number two. I know that you have been waiting, but as Chair I decided to let this discussion run as long as we did because of the importance of it.

I have arranged to cancel some of my afternoon activities and if it is all right with panel two, I would like to stand in recess until 2:00 p.m. this afternoon, at which time we will hear from the Mayor of San Antonio, Mr. Cushing, Mr. Kompas, Congressman Mills, Mr. Garner and Mr. Swander, and I thank you all very much.

[Recess.]

AFTERNOON SESSION

Senator INOUYE. We will now resume the hearings and call upon members of the second panel. Regretfully because of prior commitments the Honorable Lila Cockrell, the Mayor of San Antonio, had to leave to get on an aircraft to return to her city. She was scheduled to appear this morning, but those of you who were here would understand that the discussions carried on by the first panel covered the whole morning. And so, without objection, the statement of Mayor Cockrell will be made part of the record.

We have with us the President of the Competitive Cable Association, Mr. Harry Cushing; Mr. John Kompas of Kompas-Biel Associates of Milwaukee; Mr. Daniel H. Garner representing the Advanced Communications Corporation of Arkansas; and I regret to advise all that Mr. Wilbur Mills, the former Chairman of the Ways and Means Committee, cannot be here with us because of an injury to his ribs; and the President of MaxTel Cablevision, Mr. Robert Swander.

Shall we begin with the President of Competitive Cable Association, Mr. Cushing.

Before you proceed, sir, I want to extend to you my apologies for holding you back until this afternoon, but I felt that the issue involving telcos was one that we will have to address, and I wanted to make certain that we had the full record before us in our decisionmaking process.

Mr. Cushing.

STATEMENT OF HARRY CUSHING, PRESIDENT, TELESAT CABLEVISION, INC., AND PRESIDENT, COMPETITIVE CABLE ASSOCIATION

Mr. CUSHING. Thank you, Mr. Chairman. It was no inconvenience at all.

My name is Harry Cushing. I am the President of Telesat Cablevision, and I am also the president of a newly-formed trade group called the Competitive Cable Association. Our trade group is made up of cable companies like my own that are bringing real and meaningful competition to this industry today. It is not something that is promised for the future, but it is happening today as we speak.

I am going to dispense with basically reading from a prepared text. I will be happy to submit that and encourage the staff.

Senator INOUYE. May I assure you that all of your prepared statements will be made a part of the record.

Mr. CUSHING. Thank you.

Since competition seems to be a bandied about word, I brought some facts to really show you what competition can do. We operate what has now become the largest competitive cable TV system under construction in the United States today in Orange County, Florida. That is the county that surrounds Orlando.

Senator INOUYE. By "competitive," what do you mean? You are competing with another cable company?

Mr. CUSHING. Yes, Chairman. There are actually two choices that people have in a large part of Orange County today. I realize it probably cannot be seen very well, but I will read a couple of points from what I brought with me that will make the point I am trying to make.

This was dated September 30, 1987. This is not our stationery but from Cablevision of Central Florida. This is a subsidiary of the ATC, the Time-Warner, the second largest cable operator in the United States today, when we began offering competition in their neighborhoods.

What you will see here is:

"Dear Valued Customer: Your next bill for services will be lower! That's right. Effective with your next bill, Cablevision of Central Florida is automatically," underlined, "lowering prices. No gimmicks. No giveaways. Just lower prices for great service and top-notch programming. YOU DON'T HAVE TO CALL US TO GET THE PRICE DECREASED." Here is the zinger. "All present services and any new services will be billed at the following rates: Full basic service"—are you ready for this—"$6.50 per month."

Senator INOUYE. That is the basic?

Mr. CUSHING. Basic. "Your choice, HBO, Cinemax, Disney or Showtime, $6.50 per month each."

Now this was taking effect on the October 1 bill. Now keep that in mind, as I will show you why that is important in a second. Again, this is from ATC, the Nation's second largest cable company.

Here is a similar letter, however, from a completely different cable company. It is the second company within Orange County that we compete with, Cablevision Industries. I think they are about the 15th largest company operating in the country. You will notice, it says, "Dear Jacaranda Subscriber." Let me explain. Jacaranda is a subdivision within Orange County, the same market.

"As you are well aware, there are at least several other companies vying for business or will be in the future in your immediate neighborhood. To you, our valued subscriber, we at Cablevision Industries have elected to institute the following "special introductory' promotion."

Now keep in mind that this is going to a customer that is already hooked up. "Effective October 1st," the same day that the other company lowered the rates effective, "the following rates will take effect."

Now here is the clincher. "Basic service, $6.50; premium service, HBO, Cinemax and Showtime, $6.50."

Now how did two supposed competitors of ours, completely different companies, come up with the exact same rate for basic and the exact same rate for HBO or Showtime on exactly the same date? I am sure——

Senator INOUYE. They had dinner the night before.

Mr. CUSHING. They had dinner the night before, I am sure.

The point of what I just showed you is that competition is the real solution to the problem that you have been facing with cable TV. That is the good news, and what I showed you there is part of the good news.

I have one more. Hopefully, this is a little bit better, read. This is again that second company, Cablevision Industries. We compete in other areas in Florida with them, not just in Orange County. I tried to show you some of their systems here in Florida where they do not have competition. Here are the names.

The basic channels that you get range from 29 channels up to 33 channels. The price for their service, one here is at $14.50, but most of them are in the $17 to $18 range, some $16, some $20.

Senator INOUYE. That is for the same basics as in Orange County?

Mr. CUSHING. For the same services—well, I will get to that in one second.

Now here are the three systems in which we compete. Cape Coral, Florida, 50 channels of basic service that they are offering for $11.25; Valucia County, 45 channels for $10.95; and in Orange County they have raised it up to $7.95 now from originally $6.50, and you get 43 channels. You can see the distinctive difference from areas that have no competition to areas that do have competition.

Now that is the silver lining, and with every silver lining comes a dark cloud. These companies are just offering these low rates on the exact streets and literally house by house that Telesat begins wiring up. Literally, on the opposite side of the street they are still selling cable at twice the price.

The other thing that they are doing, as Senator Gore pointed out earlier, is they are giving away multiple months of free service to customers that try to sign up with Telesat; again, only on the streets that we activate service.

Big cable is out to exterminate competition, and the cities in some cases are willing partners. Telesat has tried to get franchises within Florida. Some of them have taken us two years or more to get. You would assume in this environment of complaints of bad service and high prices that cities would be rolling out the red carpet. It is absolutely the opposite case.

In Florida, the Florida Cable Association which has denied us membership in the past has passed a bill that mandates that cities have to go through a whole series of steps in evaluating new applicants. We have to show that we are not going to have a negative impact on the existing cable company in order to get a franchise. That is one of the criteria.

Senator INOUYE. How much do you charge for your basics in Orange County?

Mr. CUSHING. Our basic service in Orange County is $11.95.

Senator INOUYE. So they are cheaper than you?

Mr. CUSHING. Yes, but only on the side of the street that we have wired up. Literally on the opposite side, they are $16.95. There is more to it. They give away the second and third TV outlets for free, and they are charging $4 and $5 on the opposite side of the street. So the problem is much more than just basic cable.

Senator INOUYE. Do you feel that they are trying to push you out of business?

Mr. CUSHING. We have had that impression.

The good news is that there is enough market out there for competitive cable companies. We have seen the market saturation almost double. In almost every community we have gone into, a substantial number of people who never took cable before now take cable. The problem is that big cable, whether it is the problem with getting access to the programming, getting the franchise in the first place with the hurdles you have to go through with the cities, or, finally, if you get over those two hurdles and you manage to get in business they come at you with the pricing problems.

If this bill which has obviously addressed the programming concern can also look at the two areas which are the barriers to getting the franchise in the first place and the discrimination in price within the franchise, you have a real shot at seeing this kind of competition sprout up all across the country.

Thank you very much.

[The statement follows:]

STATEMENT OF HARRY P. CUSHING
PRESIDENT, TELESAT CABLEVISION, INC.
PRESIDENT, COMPETITIVE CABLE ASSOCIATION

BEFORE THE
COMMUNICATIONS SUBCOMMITTEE OF THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

HEARING ON CABLE COMPETITION

APRIL 4, 1990

My name is Harry Cushing. I am president and CEO of Telesat Cablevision, Inc., a cable television company with systems and offices serving a substantial part of the State of Florida. I am also the President of the newly-formed Competitive Cable Association, a trade group made up of cable television companies which, like my own company, are bringing true and meaningful competition to an industry that for far too long has enjoyed unregulated, monopoly status.

Although my company's size pales in comparison to a TCI or an ATC, it is the largest of the new generation of cable operators, who are trying to establish a viable business environment as the second franchisee in the community. Telesat operates in six regions in Florida. In five of those regions, Telesat is the second operator in the area, giving cable subscribers a real choice when deciding where to spend their monthly cable dollars.

The Florida cable industry has responded to Telesat's competitive initiative by declaring and waging an all-out war against the company. Telesat's experiences have been detailed extensively in comments filed with FCC in March which have been made available to all the members of the Subcommittee and their staffs. Extensive comments were also filed by the Competitive Cable Association, and those comments, too, have been made available to the Subcommittee. I will touch here only on the high (or, in most instances, low) points of Telesat's experience before making a few specific suggestions concerning the staff's draft "Cable Consumer Protection Act" now under consideration by the Subcommittee.

A reasonable person would assume that in today's cable environment, with frequent headlines complaining about high rates and poor service, that cities and municipalities would be rolling out the red carpet to welcome competitors. However, the big cable industry has conducted a vigorous campaign of intimidation and disinformation. Employing these measures, they have convinced cities contemplating the award of second franchises to either outright reject new competitors or to burden them with an insurmountable mountain of requirements that even the incumbent monopolist did not have to meet. Incumbent cable operators are often well connected to the local cable administrators and local political machines and the benefits to consumers from competition often fail to sway local franchise officials who benefit more directly from their cozy relationships with monopoly franchisees.

Not all cities and counties succumb to the pressure exerted by cable. But even in these instances, cable has found a way to block the competition. In Florida for instance, cable's trade group, the Florida Cable Television

Association (FCTA), successfully lobbied and passed a measure cynically labelled the "Level Playing Field Act". This measure passed in 1987 was in reality the "Anti-Telesat Act" and was carefully designed to ensure that the incumbent cable operator was the only team on the "field". Its provisions mandated that cities or municipalities contemplating second franchise awards must conduct lengthy public and fact finding hearings in order to determine the "public need" for a competitive cable company. It required studies on such things as the "economic impact" on the existing cable monopolist before a franchise could be granted. As a result of this measure, communities which could have easily and quickly granted second franchises now found themselves unsure of which way to go. The incumbent operator would threaten lawsuits based on violation of the new Statute should the community move forward to grant the request. The new law even permitted the local franchising authority to place "additional burdens" upon the new company that were never on the old. Communities could now reject second franchises without having to say "no" by simply demanding outrageous concessions. Telesat's detailed comments which have been provided this committee give many graphic testimonials to the effect of this law on a competitive company.

The National Cable Television Association (NCTA) at their 1988 Annual Convention in Los Angeles presented the Vanguard Award to the Florida Trade Association in recognition for the successful passage of this anti-consumer measure.

NCTA President Jim Mooney went even further when he stated, "I am filled with admiration for what the Florida Association has been able to do."

Following Florida's lead, many other state cable associations most recently California, have persuaded their state legislatures to adopt virtually the identical law.

The legislation that this committee is contemplating must preempt these state statutes that are proliferating around the country at a frightening pace. Local franchising authorities must be strongly encouraged to award competitive second franchises.

Even when Telesat is able to secure a franchise, the anticompetitive efforts of the incumbent operator do not let up. They simply shift from the governmental chambers and the courtroom to the boardrooms and the streets.

The incumbents have two primary and very effective weapons which they have employed with enthusiasm. The first is the use of exclusive programming arrangements for vital programming services. ESPN, for example, grants "overbuild protection" to systems agreeing to subscribe to their National Football League package. While our competitors are carrying Sunday night NFL games, ESPN offers competitors, such as Telesat, such riveting replacement selections as the "Great American Snooker Pool Shootout". Similar policies have been followed by CNBC, the Nashville Network and American Movie Classics. Recently, Telesat has had to file a lawsuit against the Nashville Network for refusing to sell its programming in areas where Telesat competed with another company. Last year alone, my company spent over $1.1 million in mostly defensive litigation. That is a very significant expense when you consider our gross revenue was about $8 million.

And big cable has not been content to simply use its nationwide clout to knuckle under programmers such as the Nashville Network. It has decided to buy up as many important programmers as they can.

Before its acquisition by big cable, Turner Broadcasting was among the most reasonable and fair programming suppliers in the country. Their motto was, "If you've got the money, we've got the programs."

Virtually the day the big MSO's went on Turner's Broadcasting's Board, the company did an about face, denying the Goodwill Games and TNT to competitive cable systems. Just recently Turner has announced, under pressure from cable operators, that its NFL package will not be carried on WTBS as originally announced. Instead, the exclusive Sunday night NFL package will only be available on TNT, despite the fact that TNT has 10 million fewer viewers. Of course, this move was not unanticipated. WTBS is available to virtually all competitors, while TNT is available only to big cable. It is also ironic that the Goodwill Games, subsidized by the United States Government will not be available to competitive distributors.

The second major weapon in big cable's arsenal is discriminatory pricing. Literally, on a block-by-block and even house-by-house basis, the incumbent operators follow Telesat sales representatives and slash their prices for customers who sign up for Telesat service. It is not surprising to find half-price service, multiple months of free service, free extra TV hook-ups and free remote control converter offers given to the lucky consumers who elected to take Telesat. The only requirement is an immediate disconnection of Telesat's service. Customers across the street, who have not yet been wired by Telesat, get no free offers, no months of free service and their cable bills are twice the price. Big cable's ability to cross-subsidize these artificially low rates will inevitably drive any competitor, trying to get a toehold, out of the marketplace.

Telesat and the Competitive Cable Association endorse a true "level playing field" amendment to the Cable Act, that would prohibit discrimination among all rates and services within a franchise area. This simple solution will go a long way to ensure that competitors, once they overcome the barriers to entry, will have a fighting chance to build and operate their systems. This protection is needed only as long as it takes for second franchisees to get their systems built out within the franchise and to counteract the many-year head start of the monopolist incumbent.

The good news is that competition lowers prices. As Telesat and the CCA have documented in detail in their comments, competition also brings dramatic increases in channel capacity, system upgrades, program offerings and service responsiveness. The bad news is that unfair price cuts, cross-subsidized by the incumbent operator's monopoly customers, make it almost possible for a competitive cable operator to get a foothold in the franchise area.

Telesat believes that franchised wireline competition not only provides great short-term benefits but can be viable over the long run. The viability of Telesat and other competitive cable operators, however, is extremely precarious. Without significant legislative intervention, cable competition cannot survive and grow.

In accordance with the Subcommittee's request, I also wish to make a number of comments on the specific proposals contained in the March 9 draft "Cable Television Consumer Protection Act" prepared by the Subcommittee staff. Let me first express the strong and enthusiastic support of the entire competitive cable industry for this measure as a whole. It is a thoughtful and comprehensive attempt to attack many of the problems created by the 1984 Cable Act and the prior regime of monopoly local franchising.

Let me also say, however, that the competitive cable industry believes many of the problems targeted by the draft measure will disappear in the face of effective multichannel competition. We believe strongly that the foremost objective of this legislation should be to promote the introduction of that competition.

As Telesat's experience demonstrates, local franchise authorities have been and remain a major impediment to the introduction of competition. Accordingly, we believe that local franchise authorities should be preempted from regulating cable for any reason other than their traditional police power concerns of health, safety and aesthetics. In addition, Section 621 of the Cable Act, which now permits franchise authorities to award "one or more franchises", should be amended to provide that franchise authorities should be required to award franchises to all applicants subject to the conditions as are necessary to safeguard the health and welfare of the local citizenry. Let the marketplace, as it always does in our free society, sort out the players according to the value and quality of the services they offer.

Section 640, guaranteeing nondiscriminatory access to cable TV programming, is an absolute requirement in the proposed legislation. We applaud the foresight of the Subcommittee to have included it in this draft. Telesat and the CCA would not object to a sunset provision on this very important Section. Ten to fifteen years should be a reasonable time in which competition should have an opportunity to exert itself in the marketplace. Once again, this provision is not unlike the compulsory license and relief from syndicated exclusivity given to cable during its early days.

We believe that Section 623(f) of the Cable Act already permits the FCC and local franchise authorities to prohibit discriminatory pricing. Nonetheless, in part because of cable industry threats of litigation, local franchise authorities have been inconsistent in adopting ordinances requiring uniform pricing throughout franchise areas. Section 623 is also unclear, because it only refers to basic service. For competition to flourish, it is important that an incumbent operator does not discriminate among any of its rates or services (*i.e.*, basic, premium, extra outlets, remote controls, etc.). The proposed measure should expressly provide that discrimination in the provision of any rates or services, not just basic service, is unlawful.

CONCLUSION

Telesat and the CCA believe that there are three critical areas which need to be addressed by Congress:

- **Pre-emption of local and state franchise barriers**
- **Equal access at fair prices to all programming**
- **Prohibition of rate and service discrimination within franchise**

If action is taken on these three issues, a new wave of competitive cable opportunity will sweep the country. Incumbent operators will be forced to control rates and improve service. New companies will find innovative and creative ways to not only share in existing markets, but to reach out to those consumers who have not yet enjoyed the benefits of cable TV. The new competitive generation of cable is not looking for a free lunch, just a fair shake.

I would be happy to discuss and answer any further question you or your staff may have. I would also invite you to come down to Florida to see cable competition in action. I am also pleased to announce the first annual meeting of the Competitive Cable Association which will be held at the Capital Hilton on May 8th. FCC Chairman Sikes has been gracious enough to accept our invitation as the keynote speaker and we hope that his support will usher in a new Golden Age of Cable.

Senator INOUYE. What do you think about the bill itself?

Mr. CUSHING. We think the bill is a big step in the right direction, and it does address the programming concerns; but again, the two areas that I mentioned, basically Chairman Sikes at the FCC is approaching this from mandating second franchises, which is one way to go about it, but we would suggest perhaps limiting the reasons for which franchises may be rejected may be another approach.

We would be happy to work with the staff on some wording for that area.

Then the second concern at this point is making sure that the big cable operator in the area can give it away for free, as they appear to be doing in Tennessee, but give it away free to the entire vicinity, the franchise area. That keeps the pricing fair and gives the competitor a fighting chance to get up in an operation.

Senator INOUYE. Will you submit suggested language that we can look over and study?

Mr. CUSHING. I would be happy to, Senator.

Senator INOUYE. Thank you very much.

May I now call on Mr. Kompas?

STATEMENT OF JOHN KOMPAS, KOMPAS-BIEL & ASSOCIATES, MILWAUKEE, WI

Mr. KOMPAS. Thank you, Chairman Inouye and Members of the committee. I was invited today as President of Kompas-Biel & Associates in Milwaukee, which I am, but today I am representing the Community Broadcasters Association. The Community Broadcasters Association represents the rapidly growing low power television industry. There are nearly 800 stations on the air serving local communities in almost every state.

Our industry was created in large part thanks to the help of the Senate. In 1979 you encouraged the FCC to relax the rules governing the passive translator industry to permit local origination of programming. Congress also gave us another push. It appropriated a special $10 million budget grant to the FCC for a lottery system to speed up the license award process from a mountain of tens of thousands of applications that had been received.

We believe we are fulfilling Congress' intentions when you helped create us because we are bringing new local programming to hundreds of communities. We need your help again, now.

The must-carry provisions of S. 1880 and the Senate staff draft under consideration at this hearing fail to recognize our new industry and improperly group our LPTV stations with translators and other passive technologies. As it is now written, the draft excludes LPTV from any carriage obligation; and thus, it will likely deny our local programing to many communities as we will be lumped together with passive broadcast technologies that do not originate programming.

This language reflects a concept that existed in the FCC's old cable carriage rules written before LPTV stations or, as we now call them, community broadcasting television stations, existed. The language must be updated to reflect today's conditions. We ask that, number one, it should provide that local community broadcasting stations must be carried when a cable system's broadcast channel quota is not filled with local conventional stations.

Number two, we also urge that the legislation give the cable operator the right to elect to carry a local community broadcasting station in place of a conventional station which is not providing adequate local programming service.

Our association commissioned a survey last year and found out that some three-fourths of LPTV stations are on the air 24 hours a day. Those who are originating programming average 24 percent local programming. That is nearly six hours per day of local programming which is by far more than most conventional stations. Almost 10 percent of our stations are 100 percent locally programmed.

Local programming includes sports, news, talk shows, religion, children's programming and many unique services not available elsewhere. 20 percent of LPTV stations are minority owned, again a significantly higher percentage than for conventional stations.

Community broadcasters are presenting four hours of local news a day in Hopkinsville, Kentucky; the only Hispanic TV programming in Milwaukee, Wisconsin and Washington, D.C.; the only local TV broadcast service at all in Junction City, Kansas and Lake Havasu City, Arizona; and an outlet for the local high school to serve the community in Princeton, Indiana. I can take you on a tour of community after community, from coast to coast, where community broadcasters are presenting local programming where none existed before.

It really hurts when cable systems turn up their noses at this programming. LPTV stations need cable carriage even more than conventional stations to survive, but the cable industry has often been greedy and arrogant in dealing with us. Some community broadcasting stations have been silenced, simply forced out of business as a result.

I quote a letter that I received from a local station in Kentucky which was the only competition to a commonly-owned newspaper/ TV combination. The cable operator's remark was, "We don't have to carry their signals, and we are not going to", thus denying that community diversity of thought and expression.

A Korean group recently purchased an LPTV station in New York City and is presenting programming in the language of major Asian groups. Last week, the owner told me at the NAB Convention that he is trying very hard to overcome the Asian community's distrust of government and to get his viewers to complete Census questionnaires. He felt it imperative that Asian minorities be properly counted and represented in legislative redistricting, but he cannot reach a large part of the 1.7 million Asians in the greater New York area because none of the area cable systems will carry his signal.

In a community in Florida, where the city council uses a community broadcaster's studio to produce programming, the cable system refused to comply with a directive by the city that the programming of that broadcaster be distributed on the channel, specifically reserved by the franchise for city use. The system said it would pull the plug on the city's channel if they insisted on putting on the community broadcaster's signal.

The large MSOs are the most stubborn—or sometimes the most greedy. Here are some offers made to carry community broadcasting stations: $15,000 per month to carry two LPTV stations (offered after the local newspaper editorialized in favor of carriage of a community broadcasting station); $93,000 per year plus 15% of the broadcaster's gross revenues; and 5% of gross revenues but with a minimum required payment (that one was made to a black-owned station presenting a half-hour of local news each night with black anchors and reporters).

I am hearing from our association members that the worst reactions come from cable operators who fear competition from community broadcasters. They sell local advertising for insertion into satellite services with no local content and do not want to see a community broadcaster soliciting the same advertisers to buy time in local programming. The official rejection is never worded that way, of course.

Community broadcasters are turned down even when channel capacity is available and new satellite services are being added. When the satellite feed is lucrative enough, capacity is found; and when local programming which competes for advertising is offered, the system is full to the brim.

We in the industry are working hard to fulfill the mission established for us by the Congress. We are providing new local programming services to communities of all sizes, including many which cannot economically sustain conventional stations; so they are receiving local service for the very first time. It makes no sense to disregard this service in S. 1880 or in any cable carriage legislation.

The world is different today from what it was when the FCC's former carriage rules were written. Today's legislation should reflect today's facts. Cable operators do not welcome competition in local advertising sales. We need your help. We ask that your legislation reflect the importance of our contribution to our community.

Thank you, Mr. Chairman.

Senator INOUYE. We are at this moment negotiating this matter with the broadcasters and cable companies, and I can assure you that we are advocating your views.

Mr. KOMPAS. Thank you very much, Senator. We appreciate that.

Senator INOUYE. What sort of programs do you carry on your network?

Mr. KOMPAS. The station that our firm is in the process of building will not be on the air until July 1. We are still under construction. Our plans do call, though, for local children's programming. We even have the idea to do a dating game for senior citizens. We thought that would be kind of local in nature and kind of fun.

Senator INOUYE. A dating game?

Mr. KOMPAS. A dating game for senior citizens.

Senator INOUYE. It's not one of those 900 numbers?

Mr. KOMPAS. No. Local, completely. But it is all programming that is aimed to specific demographics within our one specific area, which is Waukesha, Wisconsin. Waukesha is right next to Milwaukee and has always been a stepchild, if you will, of Milwaukee's media. We want to make Waukesha realize that it has its own voice, a media outlet that can take care of its own concerns.

Senator **Inouye**. Senator Burns, do you have any questions for Milwaukee?

Senator **Burns**. Northwest Airlines flies in there now.

I have one question. Do you sell advertising?

Mr. **Kompas**. Yes, we do, Senator.

Senator **Burns**. What happens if we embrace the idea to do away with must-carry and if-carry-must-pay?

Mr. **Kompas**. Our board has not had a chance to meet on the proposition, since the language was just most recently submitted to the staff here, so we do not know all the particulars about it; but our general feeling on the surface is that we would like to be treated as other broadcasters are treated; and if indeed that should happen to be passed, we have local programming that we feel is valuable.

Senator **Burns**. I have no further questions. Thank you.

Senator **Inouye**. Mr. Kompas, you were here when the telephone companies were having this little discussion with the cable companies. What are your thoughts on that?

Mr. **Kompas**. As far as telephone entry is concerned, it seems to us to be the answer to allow our stations to have access to the communities that they are serving. We are in desperate need of having cable carriage at this point. If that cable carriage should happen to come from the cable companies, all the better. If it needs to be the telephone companies that have to bring it for us, well then I suspect we would support that also, Senator.

Senator **Inouye**. Mr. Cushing, do you have any thoughts on that?

Mr. **Cushing**. Senator, regarding the telephone companies?

Senator **Inouye**. Yes.

Mr. **Cushing**. Currently we are building coaxial cable plant, and we think we are building about the best coax available, but we are also looking to the future. We believe that the provision of the bill that pertains to the common carrier is ideal for what we are doing.

In other words, we are in the entertainment business. We construct the cable system because we have to, not because we want to. We believe that that provision to in effect have them building the fiber plant and us leasing it back is ideal.

I heard the one gentleman mention that he was not aware of any companies that were out to lease. Well, I am going to contact him and let him know that we are interested. I can speak for most of the other members of our association. All of us would like to be leasing those fiber lines just as soon as possible.

As to whether or not the phone company should be in the business, per se, I would say that there is a divided opinion about that in our association, and it is not gelled at this point in time; but we would like to lease their lines.

Senator **Inouye**. Thank you very much.

Mr. Garner, before proceeding, will you convey my best wishes to Chairman Mills?

STATEMENT OF DANIEL H. GARNER, PRESIDENT, ADVANCED COMMUNICATIONS CORP., LITTLE ROCK, AR

Mr. **Garner**. Yes, sir, Mr. Chairman. I will be glad to. I wish he was here today because I am a very nervous person, having never done this before, and I wish he were here by my side. I will do the best I can.

Mr. Chairman and Members of the committee, thank you for the opportunity to provide testimony on S. 1880 and the staff draft of the substitute. My name is Daniel H. Garner from Little Rock, Arkansas.

My career began in the broadcasting industry in 1970 with the construction of FM radio station KLEZ in Little Rock. As a consequence of this experience in establishing a new broadcast service, I subsequently became interested in direct broadcast satellite, DBS.

In 1982 I formed Advanced Communications Corporation for the purpose of constructing and operating a DBS system. The company currently is authorized 27 channels of U.S. coverage by the FCC. We are now in the process of arranging the financing for this enterprise and plan to be in operation in 1994.

The company has been a pioneer in digital transmission and reception capabilities. This advanced technology enables the transmission of multiple video and audio channels on each of the 27 transponders. The availability of the substantial capacity permits making channels available for public purposes such as education and government services.

It is the company's plan to provide a free transponder on each of its satellites through Republic Charity Foundation, chaired by the Honorable Wilbur E. Mills, which will also donate free receiving antennas for all of America's schools and libraries, thereby establishing the Bureau of Educational Services ES networks.

I support the proposed legislation, most particularly section 640, which is designed to provide DBS access to programming consumers' desire. Thus, the major impediment to the establishment of DBS service, adequate programming, will be eliminated and consumer demand fulfilled.

DBS service will not only compete with cable, it will provide cablelike in many new innovative services to unserved and underserved people of America who live in rural areas of the United States. Thus, the quality of life will be improved for millions of Americans who are inadequately served today. The long-term prospects will positively affect all Americans.

Access to the programming is the key to the success of DBS.

Thank you, Mr. Chairman.

[The statement follows:]

TESTIMONY OF DANIEL H. GARNER
PRESIDENT, ADVANCED COMMUNICATIONS CORPORATION
BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE

April 4, 1990

Mr. Chairman and Members of the Subcommittee, my name is Dan Garner, and I am president of Advanced Communications Corporation ("ACC"), one of 8 companies that are authorized by the Federal Communications Commission to provide Direct Broadcast Satellite ("DBS") service in the United States. On behalf of ACC, I would like to thank you for providing me this opportunity to participate in the Subcommittee's consideration of the staff draft of a substitute for S.1880.

Before providing you with a detailed description of our DBS plans, let me state for the record ACC's strong support for the staff draft. In particular, ACC supports proposed Section 6, which would add a new Section 640 to the Communications Act of 1934 assuring competitive multichannel distributors nondiscriminatory access to the video programming networks consumers demand. While we believe that several minor revisions to the staff draft are required, and I will address those in passing, by and large, enactment of the staff's proposal would go far to assure that competitive alternatives to cable develop.

According to the staff draft:

> There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

Along similar lines, Senator Danforth recently wrote that:

> As Justice Oliver Wendall Holmes recognized 70 years ago, competition and First Amendment values are closely linked. Policies to promote competition and prevent market abuses simultaneously advance diversity in the marketplace of ideas.

ACC most certainly agrees with that sentiment. As the National Telecommunications and Information Administration found not long ago in examining the cable marketplace "effective competition allocates society's resources in a manner preferable to the result arrived under regulation." Experience in the communications and other industries has shown beyond doubt that consumers are always better off when truly competitive alternatives meet head-to-head.

Indeed, that was the fundamental premise underlying the Cable Communications Policy Act of 1984 -- consumers are best served by eliminating unnecessary regulation of cable systems that face "effective competition". While that premise remains valid today, the FCC's decision to find "effective competition" present wherever three fuzzy television signals could be picked up off the air, which was dubious when adopted, is utterly inconsistent with the reality of today's marketplace.

The record before this Subcommittee clearly establishes that while at least three over-the-air television signals are available across most of the country, most cable systems do not truly face effective competition. Now, I understand that the National Cable Television Association is claiming that the presence of five over-the-air television signals constitutes "effective competition" to cable, and is submitting reams of statistical analysis in support of that position. The saying "there are lies, there are damn lies, and there are statistics" is apropos. I'm no statistician; in fact, my background is in broadcasting. And I know full well that to consumers demanding Home Box Office, ESPN, Turner Network Television, USA, CNN and the like, no number of local broadcast stations constitutes "effective competition."

Earlier this week, the final round of comments were submitted to the FCC in connection with its evaluation of the status of competition in the aftermath of the 1984 Cable Act. If those comments establish one thing, they establish that only multichannel distribution technologies like DBS, wireless cable and private cable can truly constrain cable from exercising monopoly power. The staff draft properly reflects this marketplace reality by requiring the presence of a multichannel video programming distributor within a cable community as a precondition to rate deregulation.

It is not ACC's goal to see cable rates reregulated; in our view, rate regulation should be viewed solely as a backstop to be employed when necessary where competition fails to flourish. Rather, our goal is to promote competition to cable, true competition. This Subcommittee has before it an opportunity to preserve the tremendous gains in video diversity that have been made over the past dozen years, while at the same time assuring that consumers are no longer beholden to the unregulated monopoly of cable. It can do that by enacting the staff draft with the minor changes ACC proposes, which will assuredly stimulate the emergence of competitive alternatives to cable and give consumers a choice from among competing distributors of programming networks.

In recent weeks, you have been hearing much about DBS and its possible role in providing effective competition to the entrenched cable monopoly. At the same time, many have expressed serious doubts as to whether DBS will actually develop into competition to cable, or whether it will co-opted by the cable industry. From the public pronouncements by the principals of K Prime Partners and Sky Cable, both of which feature cable MSO ownership, it appears that these doubts are well-founded. Although the cable industry would have the Congress believe that both of these DBS ventures will compete with cable, the principals of each have expressly disclaimed any intention of engaging in vigorous head-to-head competition.

Unlike K Prime Partners and Sky Cable, ACC's marketing plans are clear -- we intend to use our digital DBS system to compete vigorously against the entrenched cable monopolies. In addition, we intend to provide rural Americans with their first access to the popular programming network, like HBO, ESPN and TNT, that have long been enjoyed by urban and suburban dwellers. One of the inherent advantages of DBS is its ability to provide service throughout America, even to the most rural areas. As you well know, there are many areas of the country which have not been, and never will be, wired for traditional cable service. People living in these areas will no longer be second-class citizens with respect to video programming once our DBS system is deployed.

Our aim, however, is not merely to provide entertainment, news and sports programming to subscribers. The Foundation for Educational Advancement Today ("FEAT") will be provided with two cost-free full-time transponders on our DBS system for furtherance of FEAT's efforts in association with its comprehensive national educational initiatives. FEAT is a non-profit educational public charity formed, in part, for the purpose of bringing advanced technology educational services and programming to schools, libraries and other organizations in the United States.

In addition, FEAT contemplates offering channel capacity to government agencies such as NASA, the U.S. Departments of Agriculture, Transportation, Commerce, Education, Interior and Justice, as well as the Department of Defense and the Federal Emergency Management Agency. It is also contemplated that capacity will be offered to associations such as the National Association of School Boards ("NASE"), National Education Association ("NEA"), American Association of School Administrators ("AASA"), Parent Teachers Association, American Federation of Teachers ("AFT"), and others.

Furthermore, FEAT has assurances that major corporate citizens and concerned individuals will contribute resources sufficient to facilitate placement of free miniature satellite receiving antennas in each of America's approximately 125,000 public and private schools, and libraries. With an estimated four hundred million dollar infrastructure target to be in place by 1993/94, FEAT will inaugurate the YES (Your Educational Services) Networks, which will consist of 100 or more national simultaneous transmissions of classroom lectures by "master teachers," computer and graphic instruction, animated and data channels, and other innovative services to advance America's educational needs well into the 21st century. During after-school and evening hours, the YES Networks will implement an incentive program for students delivered via DBS to homes which will provide student and teacher assistance including "point" accumulation for a variety of "rewards" for participation ranging from commercial products to a college education. FEAT's underwritten YES Networks concept has received the endorsement of NEA, AFT, NASE, and AASA, among others.

ACC's educational efforts, however, are dependent upon the success of its commercial service. Only by developing a viable commercial service will ACC be able to generate the revenues necessary to support FEAT's educational initiatives. And, in order to develop a successful service, ACC must have access to the programming services that consumers demand. As FCC Commissioner Sherrie P. Marshall recently noted:

> Access to desireable programming at fair prices is the key to the competitive viability of these potential challengers to cable. Without such access, the mere presence of an alternative multichannel provider cannot constitute effective competition.

Based on the record before the FCC and Congress, it is crystal clear that competitive alternatives to cable are having a difficult time securing access to the programming consumers demand. Since all of the popular cable programming appears to be controlled directly or indirectly by the large MSOs, I am fearful that ACC may find itself unable to deliver to consumers a competitive product offering.

While the problem of access to programming is most apparent with respect to the vertically integrated programmers, any unreasonable refusal to deal --

whether or not the particular programmer is owned or controlled by a cable MSO -- is an anathema to the public interest. Because the large MSOs wield enormous economic power over the programming networks, they can and do dictate the marketing decisions of even those "independent" programmers they do not own. The record developed by the FCC in its inquiry into the state of competition in the aftermath of the 1984 Cable Act showed that "independent" programmers, such as ESPN, refuse to deal fairly with competitors to cable.

Such unreasonable refusals to deal, which can only be attributed to a desire to curry favor with the cable MSOs (if not to direct coercion), should be clearly prohibited regardless of whether or not the programmer is owned or directly controlled by a cable operator. In fact, it appears from proposed Section 640(b) that the intent is to ban such refusals. Therefore, ACC recommends that proposed Section 640(a) be revised so that it is consistent with proposed Section 640(b) and clearly extends to "independent" programmers who are cowed by the economic clout of the cable MSOs.

To conclude, this Subcommittee is to be applauded for its recognition of a need to promote true competition in the multichannel video distribution market. By assuring that multichannel alternatives such as DBS have fair and reasonable access to the programming networks that consumers demand from their service providers, the Subcommittee can make certain that such competition flourishes.

Senator **Inouye**. Do you have any thoughts about the issue of telcos that we were discussing this morning?

Mr. **Garner**. Only a humorous thought, perhaps, Senator. We view the cable companies as sort of like the big Goliath that we were going to have to do battle with, and then behind Goliath the telcos look like a big behemoth coming upon the scene.

So I am not well versed. I can only make speculative comments at best. The capability of unlimited resources with a massive distribution system and also going into programming looks fearful to me in the long-term prospects for the American citizen, but that is my only thought, sir.

Senator **Inouye**. You believe that with the passage of this measure if it does pass your operations would flourish?

Mr. **Garner**. We would succeed. I am not sure we would flourish. I think that we can be a viable competitor to cable primarily in the rural areas. I think we can come to the cities with some of the innovative services such as the educational services with the capability to download computer software, working with record companies in the sale of compact disk music into the home, certainly in electronic publishing services.

I think we would have a very attractive package that over time would gain a substantial market. I think in the near term our pricing can be less than cable, so I think we could be competitive, yes, sir.

Senator **Inouye**. I would like to now call upon our advocate of the rural American man and woman.

Senator **Burns**. Thank you, Mr. Chairman. I would imagine that all of you here, and you will have to identify yourself, would like the competitive aspect of your entry into the cable business. Is that a correct assumption? In other words, would you like the competition or would you like to remain regulated?

Mr. **Garner**. I like competition. I think it is good for America.

Senator **Burns**. Once you get established, would you take the same attitude?

Mr. **Garner**. I think so.

Senator **Burns**. Would anyone else like to address that?

Mr. **Swander**. I would be glad to address it even though I have not given my prepared remarks.

The answer is yes, I would prefer competition because I think that it is always going to provide the best kind of solution in the long term. There is no doubt that once you have a business operating and established that presents a challenge. I think that we have to look at it from the view that that challenge makes all of us better in terms of what we do and assures us that the services we provide are in response to market demand, not something that is artificially created.

Senator **Burns**. That was unfair. I got here about 12 or 15 minutes late, and I am sorry that you had not yet given your opening statement.

Mr. Garner, getting back to your DBS entry down in Arkansas, you are familiar with the Syndex rule?

Mr. **Garner**. Yes, sir.

Senator **Burns**. That is sort of when a broadcasting entity buys a show for an area, he has exclusive rights to that.

You say you agree that everybody who is providing programming has to sell it to you whether they want to or not? Do you agree with that?

Mr. **GARNER**. I would hope that would be the case, Senator, yes, because we need access to the programming for the consumer to have a desire to subscribe to our DBS service. Without that, we really do not have a service, sir.

Senator **BURNS**. Do you think if you went into the industry it would open the door of opportunity for new programmers to come in to offer something different than what is being offered now by the traditional cable as we know it now?

Mr. **GARNER**. Yes, sir. I think if we were up and established and had a subscriber base, we would have the capacity to carry other program services that would be developed by others, and we would look forward to that.

Senator **BURNS**. You are saying now that you need access to that programming until that time comes along; is that correct?

Mr. **GARNER**. Yes, sir. That is the bottom line.

Senator **BURNS**. It always is the bottom line.

I assume that you were here this morning when Mr. McLaughlin said that we are sort of building the church for the Easter crowd; if we allow telcos in and do away with the franchising that we are going to have a lot more outlets out there than there is market to take them up and that the second one does not survive.

Mr. **GARNER**. I was not here, I do not believe, Senator, when he said that.

The premise is that he was stating there was an overbuild case?

I would probably take a different view. I would kind of look at the telcos. I would say we are talking roughly $500 billion to run that last mile to all of the homes across the United States. That is an awful lot of money when a digital direct broadcast satellite system with equal capabilities can be on orbit, on station for less than $1 billion and the cost of the receiving antennas would be less than $10 billion if you were to buy them en masse for all the 92 million households in America.

On the front, that is not a fair statement. It would be a little more because it would be over time.

Using the coaxial or using the current telephone lines as a backhaul to make it interactive, it looks to me like you can put the whole system in place for one-fiftieth of the cost of what the telco is doing it.

That is just rough speculation on my part, and it really does not address your question, so I will stop. I am sorry.

Senator **BURNS**. Okay. I think we ought to hear the rest of the statements. I have no other questions.

Thank you, Mr. Chairman.

Senator **INOUYE**. Thank you.

May I now call on the President of MaxTel Cablevision, Mr. Robert Swander.

STATEMENT OF ROBERT SWANDER, PRESIDENT, MAXTEL CABLEVISION, BETHESDA, MD

Mr. **SWANDER**. Mr. Chairman, thank you, and Senator.

I appreciate the fact that I have the opportunity to testify before you today. My name is Robert Swander, and I am President and Chief Executive Officer of MaxTel Cablevision. MaxTel is the largest private cable operator in the country. We serve some 40,000 subscribers in approximately 100,000 homes in some 28 states across the country.

I also represent MaxTel as a member of the board of directors of the National Private Cable Association, the NPCA, and I am testifying today on behalf of the Association as well as MaxTel.

Private cable provides cable programming to residents of apartments, condominiums, planned unit developments and other dwellings located on private property. In many markets across the country these are unserved or underserved communities. Because private cable facilities do not cross public streets or rights-of-way private cable operators are not subject to local franchising requirements and typically represent the only video service competitor to franchise cable in their franchise area. We use the same equipment and technology, but we compete head to head for access to these properties by customizing services and offering lower prices in every community that we serve.

Mr. Chairman, the NPCA commends the committee staff for its efforts in drafting the substitute amendment. It addresses many of the serious problems which have arisen in the wake of the 1984 Cable Act. The NPCA also believes that competitive marketplace forces should be relied upon to ensure delivery of a diversity of views to the consumer rather than cable reregulation.

Unfortunately, neither S. 1880 nor the draft substitute amendment would spur adequate competition in the cable television industry. Competition has not occurred in the marketplace because the market forces have been skewed through the anticompetitive practices of the entrenched franchise cable operator.

In order to advance private cable's ability to compete in the local marketplace, the bill must address the following four areas.

First, NPCA believes that only those video distributors who make actual physical use of public rights-of-way should be subject to local franchising jurisdiction. Because of an FCC interpretation, private cable operators cannot serve wholly private property such as planned unit developments without obtaining a franchise even though no use of a public right-of-way is involved. Such a market entry restriction based purely on the type of dwelling unit and not the use of the public right-of-way is inconsistent with the goal of competition and has no rationale.

Second, the franchising authorities, typically at the urging of the franchisees, often construe section 541 of the 1984 Cable Act to preclude the award of a limited franchise which serves only a portion of the overall geographic area. Limited franchising, for example, would permit a private cable operator to interconnect two apartment complexes separated by a public street through the simple installation of a coaxial cable that might be run across the street or underneath the street.

Such a simple interconnection capability is often a key to market entry and true competition. If you think about the logic of just an apartment complex on one side and one on the other, if the one complex is perhaps 300 units in size or perhaps 250 units, that is about an adequate size for us to go in and serve, and many of them are left unserved.

Across the street there may be a 100-unit apartment complex. It makes no sense for us to go over and to create an entirely redundant cable system headend, electronics, et cetera, across the street to serve those 100 units. On the other hand, if we were allowed to just create a simple bore across that street and interconnect it and serve it off the same headend, we would be able to do so, and those consumers could be served.

To date, nine states have passed uniform franchise statutes which require a second franchisee to wire and serve an entire geographic area served by the existing franchisee. Where the first franchisee has been able to develop free of direct competition and to become market entrenched, a second entrant cannot be expected to duplicate at least at the outset the capital investment and the widespread service obligations of the first franchisee and yet remain economically viable.

As long as all residents within a franchise area have access to cable services available from at least one of the multichannel video programming distributors, universal service goals should be considered as being met and should not be used as a shield against competition for simple street permits and crossings.

Third, mandatory access laws guarantee the local franchise cable operator access to every single potential subscriber in the marketplace by prohibiting property owners of apartment complexes, and manufactured housing parks, for example, from excluding the local operator even if the property residents are already being served by a private cable operator or a wireless cable operator.

Although this may appear to be procompetitive by virtue of, in effect, allowing a second provider in, note that mandatory access works only in one direction. He can get access to my properties where I have made a capital investment. I have no opportunity to turn around and compete with him in the properties in which he has made a capital investment and has subscribers that may perhaps desire the offering of a second competitor. My capital investment is at risk. I cannot gain access to compete in the areas served by him

Currently, 13 states and the District of Columbia have some form of mandatory access statute.

Finally, the bill should clarify language in the 1984 Cable Act so as to prevent the franchise cable industry from gaining de facto mandatory access.

Section 541(a)(2) of the Cable Act authorizes access to easements dedicated for compatible uses. Now the industry has claimed in numerous court cases that section 541 guarantees them access to wholly private properties. They force installation of franchise cable television lines within the private utility easements on such properties.

To the contrary, Congress only intended by that language to grant access to public easements such as a dedicated utility corridor on either side of a public street.

The NPCA's concerns are not abstract. The practices and the laws I have described reduce competition, and they deny real benefits to consumers.

Mr. Chairman, this will conclude my testimony. The franchising process as we have known it in the cable industry, I believe, is obsolete today and needs to be modified. The NPCA urges this subcommittee to take strong action to eliminate the anticompetitive impact of certain laws and practices I have outlined. We seek only the opportunity to compete.

I thank you very much.

[The statement follows:]

TESTIMONY OF ROBERT R. SWANDER

Mr. Chairman, members of the Communications Subcommittee, thank you for inviting me to testify before you today. My name is Robert R. Swander, and I am President and Chief Executive Officer of MaxTel Cablevision. I also represent MaxTel as a member of the board of directors of the National Private Cable Association ("NPCA"), and I am testifying today on behalf of the Association as well as MaxTel Cablevision.

Background

MaxTel Cablevision is the largest private cable company in the country with systems in 28 states. Serving hundreds of communities, MaxTel has connected over 100,000 apartment and condominium units to its cable television services, and currently serves 40,000 subscribers.

MaxTel was a founding member of the National Private Cable Association ("NPCA"). The NPCA is devoted to increasing awareness of the private cable industry among regulators, legislators and the public. Formed only three months ago, the NPCA includes some of the oldest and largest private cable operators in the country, as well as relatively new entrants to the marketplace.

Private cable, often referred to as satellite master antenna television ("SMATV"), provides cable programming, pay-per-view, and other services to residents of rental apartments, condominiums, cooperatives, manufactured housing parks, planned unit developments, hospitals, hotels, motels, nursing homes, educational institutions, and other dwellings located on private property. Because private cable facilities do not cross public streets or rights-of-way, private cable operators are not subject to local franchising requirements, and typically represent the only video service competitor to franchised cable operators in their franchise areas. Currently, the private cable industry has approximately 2.5 million subscribers and has a potential market estimated between 17 and 22 million viewers.

Scope of Testimony

Mr. Chairman, I would like to discuss why only a tiny fraction of that large potential market is actually served. NPCA certainly commends the Committee staff for its efforts in drafting the substitute amendment to solve many of the serious problems which have arisen in the wake of the 1984 Cable Act. To note but one, NPCA supports the bill's provisions aimed at ensuring equal access to programming on nondiscriminatory terms and conditions. Some members of NPCA have also been denied access to programming services critical to market acceptance or have been forced to pay more than their competitors for it. NPCA also believes that competitive marketplace forces should be relied upon to ensure the delivery of a diversity of views to consumers, rather than cable reregulation. Unfortunately, neither S. 1880 nor the draft substitute amendment would spur full competition in the cable television industry because they fail to remove impediments to the growth and survival of the private cable industry.

Competition Has Not Been Achieved

In the 1984 Cable Act, Congress made certain assumptions concerning the marketplace based upon the relative economic positions of the providers of cable television in 1984. One assumption Congress made was that competition would result with deregulation and consumers would thereby be protected by allowing the dynamics of the market economy to function. Congress also assumed that the cable industry, free from unnecessary regulation, would grow to maturity. Finally, Congress assumed alternative deliverers of cable television would also experience growth.

Have the benefits of competition which Congress anticipated been achieved? In NPCA's view, they have not. Only one of Congress' assumptions has actually materialized -- the cable industry has experienced tremendous growth. It is safe to say the cable industry's growth has gone beyond Congressional expectation. It is also safe to say, however, that Congress never intended that the cable industry would develop into the monopoly industry it is today.

The other two assumptions underlying the passage of the Cable Act -- that alternative providers of cable would experience growth and that competition in the marketplace would flourish -- have not resulted. Competition has not occurred in the marketplace whether from other franchised cable operators or alternative technologies, in large part because market forces have been skewed through the anticompetitive practices of the entrenched franchised cable operator.

In order to advance private cable's ability to compete within the local cable marketplace, S. 1880 must, at a minimum, accomplish the following:

1. Limit the franchise requirement to use of public streets and rights-of-way.
2. Preempt state "uniform franchise" statutes and clarify the Cable Act's authorization of limited franchise awards.
3. Preempt state and local cable mandatory access laws.
4. Clarify language in the 1984 Cable Act to prohibit cable mandatory access.

Franchise Requirement Limited to Use of Public Rights-of-Way

First, the bill should amend the definitional provisions of the Cable Act to restore the proper dividing line between which multichannel video programming distributor is in need of a franchise to operate and which is not. NPCA believes that only those distributors who make actual physical use of the public rights-of-way should be subject to local franchising jurisdiction. The FCC, however, has narrowly construed language to Section 522 (6)(b) of the Cable Act to exempt from the franchising requirement only those private cable operators who serve multiple dwelling units under common ownership or management. Consequently, private cable operators cannot serve wholly private properties such as planned unit developments and manufactured housing parks without obtaining a franchise even though no use of public rights-of-way is involved. These franchises are routinely denied. Such a market entry restriction based purely on the type of dwelling unit served is inconsistent with the goal of competition. S. 1880 should modify the language of the 1984 Cable Act to resolve this problem.

State Uniform Franchise Laws

Second, after passage of the Cable Act deregulating the franchised cable industry, franchised cable operators embarked upon a campaign to convince state legislatures to make market entry by competitors virtually impossible. One such anticompetitive practice I wish to discuss involves state uniform franchise laws. Section 541 of the Cable Act authorized franchising authorities to grant one or more franchises within their jurisdictions. Franchising authorities, usually at the urging of the incumbent franchised cable operator, often construe Section 541 to preclude the award of limited franchises. Limited franchises are franchises which serve only a portion of the overall geographic area subject to that franchising authority's jurisdiction. Refusals to grant such limited franchises have greatly restricted the market that can be served by private cable operators and have insulated local franchised cable operators from competition for any but the most minute segment of the cable subscriber base.

Private cable operators seek limited franchises, for example, to accommodate service extensions which are a natural outgrowth of an operator's existing private cable system without having to incur the substantial cost of installing an additional head-end facility on the new property. Limited franchising would permit private cable operators to interconnect two apartment complexes, or indeed any private property development, separated by a single public street through the simple and inexpensive installation of a connecting strand of coaxial cable. Such interconnection capability is often the key to market entry. For instance, an apartment complex of 150-200 dwelling units, or a mobile home park of similar size, has a subscriber base too small to justify economically the costs associated with the installation of a complete head-end facility as well as the necessary programming and other operational costs. The interconnection of two such apartment complexes or mobile home parks, requiring only a single head-end facility however, would raise subscriber levels to a point where market entry would be feasible.

Franchised cable operators have compounded the anticompetitive impact of refusals of franchising authorities to grant limited franchises by pressing state legislatures to adopt so-called "uniform franchise" laws. These laws explicitly preclude local franchising authorities from granting limited franchises to potential competitors of the existing franchised cable operator. Nine states have passed uniform franchise statutes.

Uniform franchise statutes prohibit the award of a franchise to a second applicant in a franchise area unless the second franchisee is required to wire and serve the entire geographical area served by the existing franchise. Where the first franchisee has been able to develop free of direct competition and to become market-entrenched, a second entrant cannot be expected to duplicate immediately the capital investment and widespread service obligations of the first franchisee and remain economically viable. Few companies will be able to obtain sufficient equity investment to withstand the complete overbuild construction schedule imposed in the midst of a price war where all the pricing advantages are held by the incumbent franchisee. Instead, competition must be nurtured more slowly, wherein competitors are allowed to proceed at their own economic pace, establishing outposts of competition, *i.e.*, through limited franchising, and expanding their base of operation as capability grows. And, as long as all residents within a franchise area have cable services available from at least one of the multichannel video programming distributors, universal service goals are met.

State and Local Mandatory Access Laws

Another anticompetitive practice stemming from state legislation involves mandatory access laws. Such laws guarantee the local franchised cable operator access to every single potential subscriber in the marketplace by prohibiting property owners of, for example, apartment complexes and manufactured housing parks, from excluding the local franchised cable operator. These statutes force private property owners to grant access to franchised cable operators for the installation and operation of their facilities even if property residents are already being served by a private or wireless cable operator.

Currently, thirteen states and the District of Columbia have some form of mandatory access statute. In other states, local municipalities have passed cable mandatory access ordinances. The franchised cable industry is actively seeking to expand the number of states willing to enact mandatory access laws and, thus, further insulate itself from competition from private cable operators and others.

It is important to remember that prior to passage of the 1984 Cable Act, Congress deleted Section 633 which would have provided for federal mandatory access. But even Section 633 had it been passed would not have forced property owners to grant access to a franchised cable operator where cable services were available to residents through a competing provider such as private cable.

Even though private and wireless cable operators offer identical or substantially similar services, cable mandatory access laws blatantly prefer the cable services of the franchised cable speaker, rather than seeking to ensure in a neutral fashion that residents simply have the ability to obtain cable television programming services from some source. While a governmental interest in promoting the widespread dissemination of cable services to certain residents may be sufficiently compelling to justify mandatory access rights for all multichannel video programming distributors, such interests do not support discrimination on behalf of the franchised cable industry at the expense of present and future competitors.

Without the protection of these laws, franchised cable operators would have to compete with private cable and other competitors for the right-of-entry contract to serve the private property. By eliminating this competition, mandatory access laws essentially foreclose private cable operators from entering the market.

No Reinstatement of Mandatory Access Rights In 1984 Cable Act

In similar fashion, the bill should clarify language in the 1984 Cable Act so as to prevent the franchised cable industry from reinstating a mandatory access provision which, as I've already noted, Congress had specifically rejected in the 1984 Cable Act. Nonetheless, the franchised cable industry has claimed, in numerous court cases, that Section 541(a)(2) of the Cable Act, which authorizes access to "easements dedicated for compatible uses," guarantees access to wholly private properties through the forced installation of franchised cable television lines within the private utility easements on such properties.

To the contrary, Congress only intended by that language to grant access to public easements, such as a dedicated utility corridor on either side of a public street.

To be sure, the argument has not persuaded all courts, but in those jurisdictions where it has succeeded, private cable operators have been shut out of the market as surely as in those states which have passed explicit mandatory access statutes. Whether working through the state legislatures or the courts, the franchised cable industry has succeeded in using mandatory access to perpetuate its monopoly in many jurisdictions.

Benefits To Consumers From Competition

The NPCA's concerns are not abstract. The practices and laws I have described reduce competition and deny real benefits to consumers. NPCA believes that removal of these impediments to the very survival of the private cable industry is the minimum required to enable it and other cable technologies to compete within the local cable marketplace, thereby checking the rise in basic cable service rates and ensuring service quality standards. Indeed, NPCA is unaware of any instance in which the subscriber rates charged by private cable operators are not below those of the franchised cable operator in the local franchise area. Even if the consumer does not directly subscribe to private cable, the consumer will, at least, indirectly benefit because the existence of the private cable as an alternative to the franchised cable operator will exert pressure on the franchised cable operator to keep its quality and prices competitive.

Conclusion

This will conclude my testimony. The NPCA urges the Subcommittee to take strong action to eliminate the anti-competitive impact of the laws and practices I have outlined. The actions I have suggested are the minimum necessary for private cable to survive in the cable marketplace. Thank you very much.

Senator INOUYE. Thank you.

Do you operate just in apartments and hotels?

Mr. SWANDER. We typically operate in apartments, condominiums, mobile home parks, in particular across the country. We have a few hotels, but that is not our primary base of business.

Senator INOUYE. What is the minimum number that you would serve in any locality?

Mr. SWANDER. I have served communities as low as 150 units. That generally represents about the lower level, and that is barely economic at that particular juncture, but there are many opportunities for interconnecting properties, but I do not have the opportunity to cross a street, even in a simple way. What I am trying to look for is, in effect, if I have to pursue the franchise, which is routinely denied, or they require me to cable the entire universe of the franchise, which is not economic, at least at the outset, I am seeking simple access in areas to serve communities that may be not served at all, or under-served.

Senator INOUYE. What sort of programming do you provide?

Mr. SWANDER. We provide a full range of programming. Our average system carries anywhere from 23 to 27, 28 channels. We have carried as high as the low 30s in terms of the channel line ups. The type of programming we carry is pretty diverse. My company was the first and now we represent one of only two, for example, to have access to HBO and Cinemax, which is typically restricted from other private cable operators.

On the other hand, services such as the new TNT service, which is routinely denied to us in the form of gaining access, even though my company obviously is very substantial in a sense of having some 40,000 subscribers. I think denial of my company on the basis of being a small and insignificant part is not material.

However, the exclusivity clauses that TNT has in their contracts requires me to go and try to acquire the programming from the local franchise operator. For me, that means having to do it in hundreds of communities across the country, which is a very laborious process. Today there are also several different sports type of channels that deny us access to their programming.

Senator INOUYE. How much do you charge to your subscribers?

Mr. SWANDER. Our average basic rate across the country, we run typical calculations of it; ours right now runs anywhere from $11.95 to about $12.05, so that is our average basic rate. We have an abundance of communities, for example, a whole block of communities in Indianapolis for somewhere around $9.95 for our basic service, and then we have other communities that might be perhaps as high as $14.95, or $15.95, that the local cable operator in those communities would be sitting at $19.95, $20, $21.95. Our services are always priced beneath the franchise operator by at least $2 and sometimes as much as $5 and $6.

Senator INOUYE. I notice your headquarters are in Bethesda. Do you operate in Montgomery County?

Mr. SWANDER. We have about three communities in Montgomery County. I have had numerous inquiries to provide service from a number of communities in Montgomery County, but quite obviously I do not have the ability to do so.

It was interesting to note in the testimonies and discussions this morning about trying to get cable out into the rural areas. Montgomery County is not too rural today, and yet it is obviously devoid of a lot of cable programming today.

We do not have the ability to do it, and it would be extremely desirable for us to be able to serve communities here locally.

Senator INOUYE. Although I am Chairman of this Committee, I know very little about electronics and telecommunications and what have you. I finally got cable into my residence, and I note that in the two months I have had it, it goes off about every other week. Whenever there is a rainstorm, bingo, it is gone, and after 9:00 p.m. there is no service, and the lights are on and everything is on but cable is off. Why does it go off like that? I have to wait until the following morning.

Mr. SWANDER. There are, quite obviously, a wide number of reasons. I am not sure whether your community, your home is served by a wired cable system, as opposed to, let us say, microwave?

Senator INOUYE. Wire.

Mr. SWANDER. In those particular cases where we would generally experience outages there has been a significant problem in the descrambling equipment that was rushed into the industry over the last couple of years. The scramblers, video ciphers, have had notorious failure rates.

If you think about my company, for example, in which I am acquiring at least a dozen video ciphers per head end, if not more, and I have got hundreds of head ends. I mean, my problem is even magnified greater than the cable industry at large, which has fewer head ends.

We have experienced a number of outages from that type of equipment. You might also get a failure of a receiver or modulator—there is a wide range. It is an electronic cable process which may well experience a wide array of reasons.

Mr. CUSHING. Mr. Chairman, I have a solution to your problem. If your franchising authority would conduct a round of awards for another cable company, you would find that whoever is providing that service to you now would suddenly be staffing almost around-the-clock emergency service.

They would be answering their phones on the second or third ring, they would be giving raises to their technicians, buying them new vehicles. They would be putting in new telephone systems. They would be putting in battery back-up stand-by supplies on their poles which stayed hooked in even when they lose the electric power.

A marvelous transformation of a cable company, the entrenched company, happens when you get some good old-fashioned competition. The problem is the franchising authorities are remiss to give out those second franchises. They want to force the one operator in there now to be a better cable company. The problem is, they do not have a enough teeth to do that, and the question that you are faced with is massive reregulation to force a monopolist to operate better or to turn loose the competition, and obviously that second alternative is the one we are advocating.

Senator **Inouye**. I get good service incidentally. But I was just curious to know why, when everything else is operating, cable goes off. But it happens after 9:00 p.m., that is it.

Mr. **Cushing**. Cable companies, even the best of them, are known for not being highly reliable because of their architecture. That is one of the things that fiberoptics brings. It brings the reliability of your telephone to you, and the cable companies' coaxial technology is inherently not the best.

It was the best when there was nothing else, but as the gentleman from the phone industry indicated, this revolution is going to occur whether we like it or not and you will—if we could be leasing those fiber lines, as I indicated earlier, you would have the reliability of your phone company with the choices of your cable company, and I think that is the best of both worlds.

Mr. **Garner**. Well, Mr. Chairman, there is also another better idea, actually. Wires are wires on the ground. and when you have lightening or someone digging up for a sewer or a water or gas line or floods, or all these terrestrial problems, you are going to have problems with wires. Whether or not they be a coaxial cable or a fiberoptic line, they are lines on the ground. If you have a digital, which is the same thing as fiberoptic, digital signal, not analog, coax or cable, going directly from the satellite to the consumer, whether the consumer be a home, or a hospital, or a library, there will be no interruption in service. So it is a more efficient way of delivering programming to a particular point.

Senator **Inouye**. Well, I thank all of you for patiently waiting for this afternoon. You have been most considerate, and if I may, the staff will be submitting a few more questions for your consideration and response.

Thank you very much, and our next step is to look over the bill and the transcript of the hearing with the hope that we will come out with something.

[Whereupon, at 3 p.m., the subcommittee adjourned.]

ADDITION ARTICLES, LETTERS, AND STATEMENTS

TESTIMONY OF

THE HONORABLE LILA COCKRELL,
MAYOR OF THE CITY OF SAN ANTONIO, TEXAS

on behalf of

THE U. S. CONFERENCE OF MAYORS
AND THE NATIONAL LEAGUE OF CITIES

before the

SUBCOMMITTEE ON COMMUNICATIONS
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

APRIL 4, 1990

Mr. Chairman, Members of the Subcommittee, on behalf of the National League of Cities ("League") and the United States Conference of Mayors ("Conference"), I thank you for the opportunity to testify today concerning the Senate Communications Subcommittee Staff's draft of a substitute bill for S. 1880 ("Draft") and on other cable issues of concern to municipalities. As you may know, the League represents more than 16,000 cities and towns across the nation, and the Conference represents the more than 800 mayors representing cities with populations exceeding 30,000 residents.

We appreciate the substantial efforts of your Subcommittee in drafting a bill which represents a much needed step toward resolving many of our cable concerns and the problems which have arisen since enactment of the Cable Communications Policy Act of 1984 ("Cable

Act"). However, the Draft curtails many provisions in S. 1880 which would have allowed franchising authorities to help ensure that consumers receive quality, affordable cable service. The Draft also vests the Federal Communications Commission ("FCC" or "Commission") with greater responsibilities, despite the fact that many current problems in the cable industry, such as dramatic rate increases and inadequate technical signal quality, can be attributed in part to actions and inaction by the Commission.

We believe that changes can be made to the Draft which are consistent with the policy choices reflected in the Draft, yet which would address many of our concerns and would protect the consumer interest in quality, affordable cable service. Further, we believe that if legislation is to be effective in resolving current regulatory and competitive problems plaguing the cable industry, additional issues must be addressed in the Draft.

The League and Conference's recommended changes to the Draft and specific proposals on other issues not addressed in the Draft are located at Attachment A,[1] which is a statement being jointly submitted by the League, Conference and the City of New York ("City"). A "redlined" version of the Draft, which the League, Conference and City prepared, is located at Attachment

---

[1] The attachments were not reproducible.

B. I respectfully request that this Testimony and the attachments be submitted as part of the formal record in this hearing.

I. NATURE OF MUNICIPALITIES' CONCERNS

Cities are deeply concerned with current regulatory and competitive problems in the cable television industry, especially with the effect of such problems on their constituents. During his March 29, 1990 appearance before the Subcommittee to discuss the Draft, James Mooney of the National Cable Television Association suggested that cities are not concerned with cable television issues. Mr. Chairman, that is simply not the case; cities do care about cable television issues and have repeatedly provided to Congress their opinions about how current problems plaguing the industry should be resolved.

Mayors must address life and death issues, such as crime, drug abuse, affordable housing, health care, and child care, on a daily basis. We also receive substantial consumer complaints about other important subjects, and cable television service is high on that list.

Issues involving cable television are of critical importance to consumers and cities nationwide. Cable systems are currently franchised to serve some 85 percent of the approximately 90 million households in the U.S.; nearly 50 million of these households now subscribe to cable. See Cablevision, Feb. 26, 1990, at 72. Over 99 percent of the cable systems in this country do not face competition from another cable system; furthermore, alternative multichannel video programming distributors are not yet viable competitors to cable systems in most cities. Thus, the local cable operator is often a citizen's only multichannel video source of news, information and entertainment programming.

Cities had hoped that the Cable Act would foster competition and technological innovation in the cable industry and that it would promote improved, yet affordable, cable service for cable subscribers. Unfortunately, however, these goals have been undermined by the FCC, the courts and the cable industry itself.

The FCC has made it impossible for cities to protect consumers from skyrocketing cable rates and has refused to update its antiquated twenty-year old technical standards for cable signal quality. Furthermore, federal courts have narrowly construed the power of franchising authorities under the Cable Act and, in some decisions, have held that a municipality's exercise of such authority is unconstitutional. The interplay of deregulation and the Cable Act's renewal provisions (which help perpetuate an incumbent cable operator's monopoly power) have encouraged the cable industry to behave with the type of consumer disregard that one might expect from an unregulated monopolist.

My Testimony does not fully discuss all of the problems resulting from this interplay of factors; it only highlights the most important ones. However, located at Attachment C is a paper entitled "Legislative Proposals to Alleviate Barriers to Effective Regulatory Oversight of Cable Television Systems and to Stimulate Competition in the Provision of Cable Television Services," which contains a detailed analysis of the issues of concern to cities and cable consumers, analysis of pending legislative measures, and the specific proposals of the League and the Conference, along with New York City, for resolving current regulatory and competitive problems. I respectfully request that Attachment C also be included in the formal record of this hearing.

II. CABLE ISSUES ADDRESSED IN THE DRAFT

A. Rate Regulation

1. Background

One of the most important cable issues confronting franchising authorities concerns the dramatic rate increases cable operators have imposed on consumers since passage of the Cable Act. Such increases threaten to divide this country into the haves and the have nots in terms of access to cable television. Since cable has become the bottleneck of video information into most American homes, cable operators often are able to take economic advantage of subscriber dependency on cable. FCC regulations have fueled the temptation of cable operators to do so.

When Congress passed the Cable Act, it directed the FCC to establish regulations which permit franchising authorities to regulate basic service rates where the cable operator is not subject to "effective competition." The cities hoped that the Commission would implement a realistic standard of "effective competition." Instead, the FCC defined the term in a manner which, pursuant to the Commission's marketplace dogma, left 97 percent of the nation's cable systems free from all rate regulation. See General Accounting Office, National Survey of Cable Television Rates and Services, at 4 (August, 1989).

The FCC concluded that a cable operator, which typically provides 20 or more channels of programming, faces "effective competition" whenever at least three over-the-air television broadcast signals are received in 100 percent of a cable community. This standard was vigorously opposed by the Department of Justice, franchising authorities and various public interest groups, but was nevertheless upheld by the courts as within the discretion of the Commission.

As a result of the FCC's rules, cable rates, as a whole, have increased at a rate much higher than increases in any of the national price indices since deregulation under the Cable Act. As the chart below illustrates, basic cable rates for San Antonio residents, for example, have increased more than 100 percent since passage of the Cable Act, and the cable operator has announced yet another rate increase which becomes effective in May 1990. This will be the second rate increase since the sale of the local cable system to the current cable operator in March 1989, which represents a rate increase of more than 25 percent since the transfer.

HISTORY OF BASIC CABLE RATE INCREASES IN SAN ANTONIO SINCE ENACTMENT OF THE CABLE ACT

	Basic Rate	Increase $	Increase %	Cumulative Increases %
Dec. 1984	$ 8.73			
Dec. 1985	9.17	$0.44	5.0%	5.0%
Jan. 1987	12.08	2.91	31.7%	38.4%
Jan. 1988	12.45	0.37	3.1%	42.6%
May 1988	14.45	2.00	16.1%	65.5%
May 1989	16.95	2.50	17.3%	94.2%
May 1990	18.30	1.35	8.0%	109.6%

The August 1989 GAO study confirms the inappropriateness of the FCC's standard nationwide, and demonstrates that the absence of rate regulation allows cable operators to use their monopolistic powers to charge consumers unfairly for the provision of cable services. The study shows that cable operators have increased rates by 29 percent per subscriber for basic cable service between December 1, 1986 (when basic cable rates were deregulated) and October 1988. Those increases are approximately three times the increase in the Consumer Price Index during that same time period. Further, 45 percent of the operators reported increases in excess of 30 percent and almost one-fifth reported increases of more than 50 percent.

A more recent study undertaken by the United States Telephone Association ("USTA") indicates substantial increases during the last several years. For example, the study found that over the period 1986-89, basic cable rates increased an average of 68 percent.[1] Over one-fifth of the cities surveyed experienced basic cable rate increases in excess of 100 percent, and over two-thirds of the cities surveyed experienced basic cable rate increases in excess of 50 percent.

While the numbers reported in the studies undertaken by the GAO and the USTA are themselves dramatic, the numbers understate the magnitude of increases faced by some cities. For example, in Boston, Massachusetts, basic cable rates rose 698 percent from 1986 through 1989. Other cities have reported increases almost as high, including Fairfax County, Virginia (615 percent); Tampa, Florida (606 percent); Denver, Colorado (600 percent); and Milwaukee, Wisconsin (532 percent).[2] Such substantial rate hikes would not have been possible in a marketplace subject to true competition or rate regulation.

---

[1] United States Telephone Association, 50 State Summary of Cable Service Fees for 1986 and 1989 (1990).

Cable operators have not only imposed monopolistic rate increases for basic cable services, but have imposed comparably disturbing rate increases for other cable services as well. Such increases call into serious question the efficacy of limiting rate regulation to only basic cable service tiers. For example, cable operators have increased installation charges and the rates for additional outlets in the home. Cable operators also have been able to reap monopoly profits by unbundling or consolidating service tiers. Further, some cable operators have inflated the rates for installation needed to receive some basic cable services in order to discourage consumers from buying those less expensive services. In addition, cable operators have been able to maximize profits by increasing the types of equipment a consumer must obtain to receive cable programming. Finally, cable operators have artificially manipulated equipment charges for basic rates, which give subscribers the erroneous impression that rates are not dramatically increasing, or else that a rate is, in fact, decreasing.

---

[2] Id.

Because cable operators rarely face viable competition from other cable systems in their franchise area, the only constraint on prices under current law is a decrease in consumer demand. However, many cable subscribers have become dependent on cable as a source of information and entertainment; thus, absent congressional action, cable operators will continue to be able to impose substantial price increases before the loss of revenue from cable subscribers choosing to disconnect their cable service exceeds the increased and unjustifiable profits from such price adjustments.

2. Comments on the Draft

The League and Conference believe that the rates for all cable services[3] should be regulated and that

---

[3] The distinction between pay and basic programming for purposes of rate regulation is no longer valid. The prohibition on rate regulation of premium pay programming was justified on the grounds that the FCC wanted to encourage the development of such programming. Given the proliferation in cable networks and cable programming in recent years, this justification is no

[Footnote continued on next page]

cable operators should be subject to a more stringent "effective competition" standard[4] that ensures that head-to-head competition exists throughout a franchise area.

In the absence of such changes in the Draft, the League and Conference recommend that several revisions be made to the Draft. The definition of "basic cable service" in Section 4(d) should be amended to clarify that all "advertiser-supported programming services" are included in the definition, regardless of whether a cable operator pays a subscription fee to receive some

---

[Footnote continued from previous page]
longer valid. Moreover, consumers expect, and are entitled to receive, all cable services at reasonable rates.

[4] The League and Conference continue to believe the "effective competition" standard proposed in S. 1880 and in the Draft are inadequate. As explained in their January 15, 1990 submission to the Senate Communications Subcommittee on S. 1880 ("January Draft"), a cable operator should be deemed subject to "effective competition" only when two unaffiliated providers of comparable video programming each: (1) offers service to at least 80 percent of the households in the franchise area; and (2) actually provides service to at least 30 percent of the households in the franchise area.

Under the Draft, cable operators would only be required to serve 67 percent of a franchise area. Under this approach, cable operators could be deemed subject to effective competition even though they mainly provided service in different parts of a franchise area. If both have the capacity to serve only 67 percent of the franchise area, it is possible that they will actually compete in only 34 percent of the franchise area.

of that programming. Further, the Draft should clarify that the definition includes all tiers on which any type of basic programming appears.

Further, the rate regulatory plan in the Draft contemplates a national rate regulatory structure which the Commission would implement and oversee. Franchising authorities, which adopt laws and regulations in accord with the national policy, would have the right to regulate rates. For such a system to be effective in ensuring that cable operators do not impose unreasonable rates on consumers, several revisions and clarifications must be made in the Draft, which are outlined in Attachment A and Attachment B. These revisions include:

- in addition to the installation and rental charges, subjecting to rate regulation the selling of equipment necessary to receive cable service;

- a requirement that the Commission periodically update its standards to reflect changes in the communications marketplace;

- clarifying how the FCC should consider transfer costs in determining the reasonableness of a rate increase;

- along with the other public interest factors delineated in Section 623(b)(3) of the Draft, requiring the FCC to consider local factors (e.g., the failure of a cable operator to serve all areas of its franchise, slow response to consumers' requests for service or repairs, and elimination of programming and cable-related services) in determining whether a rate increase is reasonable since local conditions might make a rate increase which appears "reasonable" under the proposed standards unreasonable if actually imposed in a particular location;

- amending Section 623(b)(4)(A) of the Draft to clarify that franchising authorities must submit proposed, rather than enacted, rate regulatory plans for FCC review and approval prior to actual enactment of such plans, and adding a provision in the Draft requiring the FCC to review such plans in a reasonable period of time;

- amending Section 623(b)(4)(A) to clarify that franchising authorities have the right to adopt regulatory programs that are not inconsistent with national rate regulatory policy;

- amending the revocation provisions under Section 623(b)(4)(B) of the Draft to ensure that the FCC revokes the right of a local franchising authority to regulate rates only in those instances where the franchising authority has willfully or repeatedly failed to comply substantially with national policy, and the FCC has provided the franchising authority notice of the inconsistency and the chance to cure it prior to revocation;

- amending the revocation provisions under Section 623(b)(4)(B) to clarify that local franchising authorities have the right to seek to have their rate regulatory power restored after a reasonable period of time;

- eliminating the right of third parties to trigger full-scale review of local regulation pursuant to Section 623(b)(4)(B) in the Draft, but granting the FCC the right, upon its own motion, to review valid challenges to local authority; and

- ensuring that the "effective competition" standard is not subject to revisions by the FCC which would undermine Congressional intent.

B. Technical Standards for Signal Quality

1. Background

Although cable rates have increased, cable operators have not similarly improved the quality of services to consumers, thus making the rate increases especially unfair. Cities have found their ability to require cable operators to make commensurate improvements in cable service hampered by, among other things, FCC and judicial limits on their ability to adopt meaningful technical standards for cable signal quality.

Indeed, the FCC has never updated its nearly twenty-year old technical standards for Class I cable channels (those carrying over-the-air broadcast signals) to reflect developments in cable technology -- notwithstanding its repeated acknowledgment that these standards are "incomplete" and were intended only as a "first step" to defining adequate signal quality. At the same time, the FCC has prohibited cities from negotiating with their cable operators standards different than the FCC's. The Supreme Court has held that Congress intended in the 1984 Cable Act to codify this restrictive FCC preemption policy, even though there is absolutely no reference to the FCC policy anywhere in the Act or its legislative history. City of New York v. FCC, 108 S. Ct. 1637 (1988).

To date, the FCC has not adopted any signal quality standards whatsoever for the newer (non-Class I) channels of cable service (such as satellite-delivered channels, PEG and commercial access channels and two-way services); and it has prohibited franchising authorities from doing so. The U.S. Court of Appeals for the D.C. Circuit correctly held that such a prohibition in the absence of standards was "arbitrary and capricious." However, in response to the Court's directive to consider adopting the necessary standards for non-Class I channels, the FCC has simply proposed to extend to those channels its twenty-year old Class I standards -- without making any effort to consider what changes should be made in these outmoded standards.

Section 626 of the Cable Act requires franchising authorities to consider the cable operator's "signal quality" in determining whether to renew that operator's franchise. Furthermore, franchising authorities are required to evaluate, on a day-to-day basis, a substantial number of subscriber complaints about signal quality. The complete absence of any meaningful signal quality standards at the federal level, combined with a prohibition on the adoption of such standards at the local level, have deprived franchising authorities of an objective basis for assessing whether a cable operator is in fact providing satisfactory signal quality.

2. Comments on the Draft

The Draft would grant the FCC the sole authority to enact and enforce technical standards for signal quality. The League and Conference believe that local franchising authorities also should have the right to adopt and enforce local technical standards. Local regulatory authority is needed since national standards will not in all cases be adequate enough to provide the signal quality that cable subscribers may expect and deserve. Further, current signal quality problems have arisen as a result of the refusal of the FCC to update its 20-year old standards. Hence, we are not optimistic that the Commission will adopt technical standards that are adequate and suitable for local needs.

If local franchising authorities are not granted the right to establish local standards, at a minimum, the Commission should be required to adjust its standards as appropriate to satisfy the signal quality needs of local cable communities. Further, the Draft should include "time frames" so that cable operators have to comply with the new technical standards within a reasonable time period.

C. Renewal of Franchises

1. Background

Another major concern of franchising authorities involves renewal under Section 626 of the Cable Act. Only recently have courts, cities and cable companies grappled with the meaning of the Act's renewal provisions since the provisions did not apply to cable franchises expiring prior to mid-1987.

Section 626 is intended to balance the interests of cable operators and franchising authorities in the renewal process. In fact, however, the renewal provisions are procedurally and substantively complex and severely limit the power of franchising authorities. Furthermore, they compel franchising authorities to assume adversarial positions with cable operators to avoid waiving their rights and to prepare the documentation necessary to consider whether to deny renewal. Most significantly, the provisions of the Act make it difficult for a franchising authority to deny renewal of a franchise to a cable operator that has not adequately served the community's needs.

Section 626 is complex. Franchising authorities may find it difficult to review effectively a cable operator's renewal proposal if they are required to abide by the cumbersome renewal provisions and to litigate challenges to their renewal authority under the Cable Act.

As the law presently stands, many cable operators will not have an incentive to provide the full measure of quality cable service. A cable operator will assume that a franchising authority's threat not to renew a franchise, if services are not improved, is just that -- a threat, which a franchising authority may have little ability to enforce under the current renewal provisions.

2. Comments on the Draft

The Draft, which recommends amending the judicial review standard in Section 626 of the Cable Act, fails to address the concerns of the League and Conference with the renewal provisions in the Cable Act. The League and Conference believe that the best solution to renewal problems is to repeal Section 626. Franchising authorities should be allowed to structure their franchise renewal proceedings in any manner consistent with applicable state and local law (as they had the right to do prior to the Cable Act). Traditional concepts of administrative due process will afford cable operators sufficient protection. Further, the public would benefit from repeal of Section 626 because cable operators providing inadequate service would no longer believe they have a virtual guarantee of renewal.

If Section 626 is not repealed, at a minimum, revisions to the Draft should be made. The standard for judicial review in the Draft should be changed from "substantial evidence," to "arbitrary and capricious," as set forth in S. 1880. The "arbitrary and capricious" standard is the one often applied in judicial review of many administrative decisions by cities.

Further, a provision also should be added to the Draft granting municipalities the right to solicit competing bids for a franchise subject to renewal. If a franchising authority determines that a competing operator will better serve a community's cable television needs, the franchising authority should not be obligated to grant renewal of the existing franchise. S. 1880 included a provision which would have granted cities the right to solicit competitive bids.

D. Horizontal and Vertical Integration; Leased Access

1. Background

Cities are concerned that increasing horizontal concentration and vertical integration in the cable industry will make it difficult for independent cable companies, cable programmers and alternative multichannel video programming distributors to compete with multiple system operators ("MSOs") and their affiliated programmers. Despite the growth in the cable industry, MSOs have garnered an increasingly inordinate share of the cable market. In 1980, the five largest MSOs provided access to 29 percent of all cable subscribers; now those MSO's account for more than 40 percent of all subscribers.[5]

Large MSOs may use their substantial economic powers to force cable programmers to provide popular programming exclusively to them in those few areas where the MSOs' confront some competition; likewise, they may deny access on their cable systems to unaffiliated programming sources, in spite of leased access provisions in the Cable Act which are suppose to ensure that independent programmers have access to cable systems. One study, for example, demonstrated that Time Incorporated (now Time Warner), which owns HBO and Cinemax, is less likely to carry Showtime and The Movie Channel on its cable systems, which are owned by Viacom, another MSO; similarly, Viacom, which owns Showtime and The Movie Channel, is less likely to offer HBO and Cinemax on its cable systems.[6] In either case, it is the consumer who is denied program diversity.

---

[5] Harris, "D.C. Puts the Heat on Cablers," Variety, April 13, 1989, at 1; Kriz, "Communications Focus," National Journal, April 29, 1989, at 1085.

Cable programmers affiliated with MSOs may refuse to sell, or sell only on unfavorable terms, programming to unaffiliated cable systems and other multichannel video programming distributors. For example, the Chief Executive Officer of the National Rural Telecommunications Cooperative ("NRTC") has testified that the 17-channel, basic service package that the NRTC offers to home satellite dish owners costs on the average

---

[6] M. Salinger, "A Test of Successive Monopoly and Foreclosure Effects: Vertical Integration Between Cable Systems and Pay Services" (Sept. 1988).

444 percent more at wholesale than a cable distributor would pay for the same 17 channels.[7]

Such conduct by MSOs and their affiliated programmers hamper the competitive goals of the Cable Act. If Congress does not take action, in a few years a small handful of MSOs and their affiliated programmers may totally dominate the programming choices of American consumers. The price consumers may pay for such dominance is a significant increase in cable rates and a corresponding decrease in the diversity of programming on cable systems.

2. Comments on the Draft

The League and Conference believe that the provisions in Section 6 of the Draft designed to alleviate vertical integration concerns would help prevent any discrimination by cable programmers against unaffiliated cable systems and other alternative multichannel video programmers. However, the section apparently addresses only one-half of the problem. A provision should be added that would prohibit cable operators from discriminating against unaffiliated programmers in terms of access to their cable systems. Further, cable operators and cable programmers should be prohibited from entering into exclusive contracts for programming unless the programming is offered to competitors to the cable operator, or to the programmer, on nondiscriminatory terms. Finally, the League and Conference believe that a provision should be added granting persons discriminated against by cable operators or their affiliated programmers the right to bring a civil action. After a party establishes a prima facie case of discriminatory action by a cable operator or a cable programmer, the burden of persuasion should be on the defendant cable operator or cable programmer to demonstrate a separate nondiscriminatory, procompetitive reason for its action which outweighs the discriminatory impact on the plaintiff.

---

[7] B. Phillips, Testimony Before the United States Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications (June 21, 1989).

The League and Conference support the provisions in the Draft which would allow the FCC and franchising authorities to ensure that the terms of leased commercial access under Section 612 of the Cable Act are fair and reasonable. To a large extent, the leased access regulatory plan in the Draft tracks the rate regulatory plan in the Draft. The concerns of the League and Conference with the leased access provisions are essentially the same as those addressed above in the comments on rate regulation, and, as detailed in Attachment A and Attachment B, the League and Conference recommend revisions to the Draft similar to those they recommended in the rate section.

In addition to these changes, Section 612(h), which is identical to Section 612(h) in the existing Cable Act, should be deleted. We believe it would be unconstitutional for a franchising authority to prohibit the carriage of leased access programming it deems obscene or indecent. The Supreme Court has indicated that the appropriate manner to deal with such issues is for local prosecutors to challenge such programming.

In addition to the provisions above, the Draft includes other provisions which would stimulate competition in the cable industry. Sections 8 and 9 of the Draft include provisions which would limit horizontal concentration and vertical integration in the cable industry; Section 12 would allow the FCC to explore the possibility of requiring television manufacturers to include a switch permitting viewers to change readily among all video distribution media. The League and Conference support the approach in these provisions to alleviating competitive problems in the cable industry.[8]

---

[8] As detailed in Attachment C, the League and Conference also believe that local franchising authorities should be allowed to take appropriate actions to alleviate horizontal concentration and vertical integration concerns at the local level, including requiring that a cable operator divest itself of other media holdings, and the division of a franchise

[Footnote continued on next page]

E. Must-Carry and Retiering

1. Background

Cities are concerned about the continued viability of local television broadcast stations, which have long been an important source of local news and information to consumers. Increasing vertical integration raises concern that cable companies will eliminate (or switch to undesirable channel positions) broadcast stations in favor of affiliated programmers. The exclusion of broadcast stations from cable systems will limit their access to home viewers, thus threatening their continued economic survival and the supply of important local programming to consumers.

These concerns result from the judicial elimination of the FCC's longstanding must-carry rules, which required cable operators to carry the signals of all local television stations within their service areas. The problem is compounded by Section 625(d) of the Act which allows cable operators to realign their service offerings if they are not subject to rate regulation. Realignments have made it difficult for cable subscribers to locate programming and have resulted in complaints to

---

[Footnote continued from previous page]
area in order to introduce competition to the sole franchised cable service provider.

franchising authorities by programmers whose services have been retiered or shifted to a new dial location.

2. Comments on the Draft

Section 15 of the Draft would encourage cable operators to carry local television broadcast signals. The League and Conference support, as recommended in the Draft, the tying of a cable operator's right to enjoy the benefits of compulsory licensing to its carriage of local television broadcast signals.[9] Further, franchising authorities are prepared to exercise the role which the Draft would grant them in resolving disputes over the channel positioning of qualified broadcast stations, as long as Congress establishes clearly articulated federal guidelines for exercising such power and as long as municipalities are granted immunity in any lawsuit challenging such authority.[10]

---

[9] In order to ensure that cable operators abide by the public access requirements in Section 611 of the Cable Act, the League and Conference also recommend that a cable operator's right to enjoy the benefits of compulsory licensing should be tied to compliance with the Section.

[10] The League and Conference believe that the Congress should also repeal Section 625(d) of the Cable Act, which grants cable operators the authority to rearrange service tiers in the absence of rate regulation. A local franchising authority should have the right to approve retiering decisions by cable operators regardless of whether the operators are subject to rate regulation.

F. Damages Immunity

1. Background

Increasingly, cities are finding their authority to regulate cable television systems challenged in court on various statutory and constitutional grounds. These lawsuits are expensive for cities to litigate and expose them to the possibility of extraordinary monetary judgments. As a result, the temptation is for cities to settle, rather than to defend, their authority in such suits.

For example, the communities of Palo Alto and Atherton, California, recently agreed to pay a cable operator $2 million to settle a lawsuit in which the court ruled that the cities could not collect franchise fees in excess of those imposed on comparable users of the cities' rights-of-way, even though such fees did not exceed the Cable Act's five percent cap. The cities stated that they needed to settle the suit in order to protect their taxpayers from an estimated $1 million appeal and a possible $10-$15 million damage assessment should they lose an appeal.

2. Comments on the Draft

The Draft would limit damages immunity to First Amendment claims brought pursuant to the Cable Act. The League and Conference believe that Section 13 of the Draft should be amended to grant franchising authorities immunity in any claim challenging the right of franchising authorities to regulate a cable operator pursuant to the Cable Act and to any other applicable law or a franchise agreement, except for claims where an individual proves discrimination on the basis of race, color, sex, age, religion, national origin or handicap. Furthermore, the reference to attorneys' fees in the Draft should be stricken. Such changes are needed to eliminate the possible "chilling effect" of damage judgments and huge attorneys' fees awards on a franchising authority's exercise of its franchising power.

G. Telephone Company Cross-Ownership

1. Background

Since the acquisition and start-up costs of cable systems are substantial, there are few potential competitors which have the financial capacity to enter and compete in the cable marketplace. Of the potential competitors, telephone companies ("telcos") are most often suggested as the best possible source of competition. In addition to providing competition in the provision of cable service, proponents of telco entry argue that telco entry also may result in technological innovation, such as the introduction of fiber optics technology, and cable service to areas which are not economically feasible for cable operators to serve.

The Cable Act, however, prohibits telcos from providing video programming to subscribers in their telephone service area (except in certain limited circumstances involving rural areas). Congress should reconsider this prohibition.

2. Comments on the Draft

The League and Conference are not opposed to the concept of cable service jointly being provided by common carriers and video programming distributors as envisioned in Section 10 of the Draft. In fact, subject to appropriate safeguards, the League and Conference have supported even broader participation of telephone companies ("telcos") in the provision of cable service. However, the League and Conference are opposed to the provision of cable service as currently outlined in Section 10 if it is not subject to local franchising requirements.

III. ISSUES OF IMPORTANCE NOT ADDRESSED IN THE DRAFT

There are a number of other cable regulatory issues which concern franchising authorities and which warrant congressional attention. A summary of the problems and of possible solutions are outlined in Attachment A. The problems include the following:

- uncertainty over which assessments on a cable operator are franchise fees, and which assessments and revenues are not included in calculating the five percent cap;

- in light of dramatic cable rate increases, the continued access of low-income residents to essential local news, information and entertainment at an affordable price and in the absence of "lifeline service" tier rate regulation;

- uncertainty over the right of local franchising authorities to regulate transfers of cable systems;

- uncertainty over federal, state and local jurisdiction over cable television matters;

- uncertainty over the right of franchising authorities to enforce penalty provisions in franchising agreements;

- in light of increasing vertical integration, the continued access of cable subscribers to local programming and programming of interest to local cable subscribers;

- challenges to the right of franchising authorities to deny requests for franchises and to require that cable service be offered to all residents in a franchise area;

- negative impact of trafficking on cable rates and cable service;

- provisions in Section 625 of the Cable Act which make it extremely difficult for franchising authorities to deny franchise modifications which are not in the best interest of a cable community;

- insufficient guidance under Section 627 of the Cable Act as to the right of franchising authorities to act once a franchise is revoked, especially when a franchise is revoked for cause, and as to the price that an incumbent cable operator has the right to receive for its cable system;

- inadequate protection under Section 631 against improper disclosure of private subscriber information for non-cable purposes; and
- subscriber dissatisfaction with cable service, and the uncertainty over whether Section 632 of the Cable Act might preempt local consumer protection standards.

IV. CONCLUSION

The Draft represents a positive approach to resolving many of the problems which have arisen since enactment of the Cable Act. However, in order to ensure that the Draft is effective in protecting consumers and enhancing competition in the cable industry, we believe that the recommended changes outlined above must be incorporated into the Draft. Further, we believe that the Draft must address the other problems which the League and Conference have identified as ripe for Congressional action.

SUPPLEMENT TO THE TESTIMONY OF THE HONORABLE LILA COCKRELL, MAYOR OF THE CITY OF SAN ANTONIO, TEXAS

ON BEHALF OF

THE UNITED STATES CONFERENCE OF MAYORS
AND THE NATIONAL LEAGUE OF CITIES

BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

APRIL 4, 1990

Mr. Chairman, Members of the Subcommittee, we thank you for the opportunity to answer the post-hearing written questions of Chairman Daniel K. Inouye and to provide further comments for the hearing record regarding the Senate Communications Subcommittee Staff's draft of a substitute bill for S. 1880 ("Draft").

I. Responses to Post-Hearing Questions

QUESTION 1

In response to concerns over rate increases, the cable industry has pointed out that the rate increases have been accompanied by an increase in the number of program services and that the cost to the subscriber for each program service has only increased by an average of one penny. What is your response to these contentions?

ANSWER

We believe that this argument by the cable industry is misleading and ignores several critical facts.

This argument is based upon data contained in the cable rate study conducted by the General Accounting Office ("GAO"). However, the GAO data was obtained by dividing the average basic cable service rate by the average number of basic cable channels. These figures do not reflect dramatic increases cable operators have imposed for cable-related charges, such as for installation. The rate increases for such cable-related equipment, services and charges often have been as high as, if not higher than, the increases for basic cable service rates. In addition, cable subscribers must now pay for services, such as program guides, they formerly received for free. Hence, the GAO study is not an accurate indicator of the true increase in cost to cable subscribers of receiving cable service.

Moreover, we believe that most rate increases have been far in excess of the cost to cable operators of adding such programming. In addition, one would have expected programming costs to decrease, given that cable operators receive revenues or advertising space from, for example, home shopping programmers.

Furthermore, prior to rate deregulation in December 1986, many cable subscribers had the option of selecting among different tiers of cable service at different prices. Many cable operators have eliminated lower-priced tiers and now offer only one tier of service. As a result, many cable subscribers are now receiving more cable programming, but they are being forced to pay more to receive programming they formerly had the option of not receiving.

QUESTION 2

It has been suggested that cities should have the ability to request competing applications for franchises to be considered simultaneously with the existing franchise renewal application. Why can't this occur today by the solicitation of bids for a second franchise at the time of renewal?

ANSWER

Cities would welcome the opportunity to solicit meaningful bids for a second franchise at the time of renewal, but the Cable Act and economic factors often make the bidding process unattractive to potential competitors. These competitors know that it is extremely difficult under the Cable Act for a franchising authority to deny a renewal proposal and, thus, grant them the franchise. In addition, many cable operators know that it is economically infeasible to operate more than one cable system in many communities. Hence, there is not a demand for additional franchises in these communities. Finally, many MSOs, which could afford the initial start-up cost of operating a cable system, refuse to compete in a particular franchise area with another MSO -- thus limiting the sources of competition in those cities where the local cable system is owned by a MSO.

QUESTION 3

I have seen studies indicating that because of local franchising requirements cable costs have increased by 20-30%. Do you believe this is correct?

ANSWER

No. It is our understanding that the study to which the Chairman is referring appeared in the July and August 1988 issues of Cable T.V. and News Media Law & Finance.[1] We question the validity of the findings of that study since it is based on telephone interviews with only 66 cable operators -- which is not enough to produce statistically significant findings. Further, there is no indication that the author independently verified the information the cable operators provided by contacting franchising authorities or other persons who would also have available much of the information requested in the survey. Finally, it is difficult to judge the validity of the findings since we do not have access to the underlying data. Hence, we believe that the 20-30 percent figure is much higher than the actual percentage of total cost represented by franchising requirements, given the incentive of cable operators to exaggerate the cost to them of franchising requirements.

Furthermore, we believe that the marginal costs imposed by franchising requirements are reasonable and are necessary to serve the public interest. Franchising requirements that the study's author identified as increasing the cost of operating a cable system included, among others, institutional networks, community programming, and free cable drops to schools and other public buildings. We believe that such costs are more than justified in terms of the benefits to the public. Other costs, such as franchise fees, are the only compensation that cable operators must pay for the use of valuable public rights of way and would be imposed, as they are on other users of public rights of way, regardless of whether cable operators are franchised.

---

[1] Zupan, "Franchising's Effect on Cable Rates," Cable T.V. and New Media Law & Finance, August 1988 at 1; Zupan, "The Cost of Franchise Concessions," Cable T.V. and New Media Law & Finance, July 1988 at 1.

QUESTIONS 4 & 5

I have also seen studies indicating that if cable operators are earning any monopoly profits, the local franchising authorities are in effect extracting them through franchise fees and other requirements. Do you think this is the case, and is it fair to consumers?

The 1984 Act places a 5% cap on franchise fees. Is it effective in limiting levies by franchising authorities?

ANSWER

We do not believe that franchising authorities are extracting a cable operator's monopoly profits.[2] Further, we believe that Section 622 of the Cable Act makes it impossible for cities to extract monopoly profits or to impose any other levies that circumvent the five percent franchise fee cap. Cable operators are the only beneficiaries of the monopoly profits they extract from cable subscribers.

Without considering whether the five percent franchise fee cap provides fair compensation for use of valuable public rights of way, we believe that Section 622 of the Cable Act serves its purpose. The Section prohibits local franchising authorities from collecting more than five percent of a cable operator's gross revenues as franchise fees. To the extent they are not excluded from the franchise fee definition, any other franchising requirements that a franchising authority may impose would be offset against this five percent limit -- thus prohibiting franchising authorities from subverting the five percent cap. Furthermore, the Section prohibits franchising authorities from imposing unfair assessments since it offsets against the five percent franchise fee cap any tax, fee or assessment imposed on a cable operator because of its status as such. Finally, the Section prohibits franchising authorities from imposing taxes, fees or assessments of general applicability which are "unduly discriminatory" against cable operators. Hence, the Cable Act establishes clear limits on the levies that franchising authorities can impose on cable operators.

---

[2] It is our understanding that the study to which the Chairman is referring is the one referred to in Question 3. For the reasons noted in response to that Question, we question the validity of the study's findings.

There is no evidence that franchising authorities have been systematically violating the Section's limits. If there are any violations by franchising authorities of the Section, cable operators have the right to seek appropriate relief.

QUESTION 6

Prior to the 1984 Act, franchise fees could only be used for cable related purposes. Should we return to this policy?

ANSWER

Franchise fees have never been limited in this manner. Prior to 1984, cable operators could be required to pay franchise fees of up to three percent of their annual gross revenues, with no limits on how cities could allocate the fees. The FCC allowed a franchising authority to collect an additional two percent (for a total of five percent) of a cable operator's gross revenues upon a showing that the cost of regulation exceeded three percent. In addition to franchise fees, franchising authorities were allowed to collect ongoing support for PEG access channels -- which was not offset against the franchise fee. The Cable Act modified this arrangement by allowing franchising authorities to collect a five percent franchise fee without justifying the fee to the FCC. Further, the Cable Act offsets ongoing support for PEG access channels against the five percent cap.

We do not believe it is desirable to return to the pre-Act arrangement. We believe the FCC wrongly required franchising authorities prior to 1984 to demonstrate that franchise fees in excess of three percent were for cable-related purposes. As the legislative history to the Cable Act makes clear, the five percent franchise fee should be viewed as compensation for the use of valuable public rights of way.[3] Given that franchise fees are imposed based on the use of public rights of way, rather than on the character of the user, we believe it is a city's right to spend such fees in any manner it deems appropriate, cable-related or otherwise.

QUESTION 7

It has been suggested that many local franchising authorities have adopted policies and regulations which have hindered the ability of the competitors to cable to reach potential consumers. Would any of you care to comment on that concern?

ANSWER

Municipalities do not hamper competition and are more than willing to grant overbuild franchises to cable operators where they are economically feasible. However, virtually every study of overbuilds concludes that market conditions, rather than actions by franchising authorities, are the reason for the small number of existing overbuilds. The most frequent rationale offered is that cable is a natural monopoly and is consequently unable to provide a sufficiently attractive economic return when competition is attempted. See Affiliated Capital Corp. v. City of Houston, 735 F. 2d 1555, 1563 (5th Cir. 1984). Furthermore, in a survey of 67 overbuilds, 37 operators had to combine with the competitive company in order to survive, only seven were able to maintain a profit, and the others went out of business.[4] Hence, the absence of competitive overbuilds is the result of economic factors, not the refusal of cities to allow other cable operators to compete.

Cities also cannot be blamed for the absence of competition from wireless cable operators and satellite delivery systems since cities are precluded from regulating such media. Courts have upheld regulations by the FCC preempting local regulation.[5]

---

[3] H.R. Rep. No. 934, 98th Cong., 2d Sess. 26 (1984).

[4] "Overbuild Threat Looms Large, Cable Lawyers Agree," Multichannel News, October 3, 1988 at 19.

Franchising authorities will continue to ensure, as required under Section 621(a)(3) of the Cable Act, that cable operators provide universal service, regardless of the income of residents in certain sections of a franchise area. Therefore, to the extent that a cable operator that uses public rights of way attempts to "cream skim" (i.e., serve only the wealthier areas of a franchise area), franchising authorities will continue to require that such cable operators be franchised and provide cable service to all residents in a franchise area. Such a requirement is not anticompetitive; instead, it ensures that cable operators compete throughout a franchise area and ensures that all residents in a cable community enjoy the benefits that result from such competition.

QUESTION 8

Do you support the provision in the staff draft which permits phone companies who construct a broadband integrated network to provide video programming on a common carrier basis, without a cable franchise?

ANSWER

Although we are not opposed to concept of cable service jointly being provided by common carriers and video programming distributors, we believe such cable service providers should be subject to appropriate franchise requirements. There is no guarantee that such cable systems, if not franchised, would serve the public interest, such as the provision of cable service to all, regardless of income.

It has been suggested that local franchising is not required since common carriers are already regulated by some states (and by some cities) -- thus making cable franchising redundant and unnecessary. We disagree. Common carriers are regulated differently in various states; in some instances, local cable regulation of common carriers might duplicate state regulation. To the extent that there is duplication, states already have the power to streamline or eliminate the authority of cities to regulate common carriers providing cable service. Therefore, there is no need to prohibit local franchising authorities from subjecting common carriers to local franchising requirements. States are able to protect their regulatory interests, and a ban on cable franchising may be undesirable in instances where a state would prefer delegating to cities franchising authority over common carriers and programmers providing such cable service.

---

[5] See, e.g., New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984); New York State Comm'n on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

QUESTION 9

It has been suggested that the nondiscrimination provision of the staff draft should be limited to vertically integrated programming services. Do you agree?

ANSWER

Cities are concerned about the access of cable subscribers to a diversity of programming at an affordable price. Increasing vertical integration and horizontal concentration threatened the access of consumers to such programming. We believe that Congress should enact competitive measures which would eliminate the ability of a cable operator, as a result of being horizontally concentrated or vertically integrated, to abuse its market power to the detriment of cable subscribers. If the nondiscrimination provision in the Draft will not resolve our concerns, Congress should enact additional measures.

QUESTION 10

It has been suggested that we should limit rate regulation to that tier of cable programming that includes broadcast signals and public access channels. Do you agree with that suggestion?

ANSWER

No. Rate regulation should not be limited to broadcast signals and public access channels. Consumers expect, and are entitled to receive, all cable services at reasonable rates. Furthermore, cable operators might only include broadcast signals and PEG channels on regulated tiers and relocate other popular basic programming to unregulated tiers. Tiers including only broadcast signals and PEG channels have proven not to be popular with subscribers. Hence, cable operators would be able to undermine the protections for subscribers intended by rate regulation by creating tiers of regulated basic service to which few cable consumers actually subscribe.

STATEMENT OF ROBERT A. ALM, DIRECTOR, HAWAII STATE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

We appreciate the opportunity to comment on the draft Amendment in the Nature of a Substitute for Cable Television Consumer Protection Act, S. 1880.

The State is in accord with all nineteen "Findings" and the "Statement of Policy" enunciated in the draft amendment. They reflect the importance of cable communications in the lives of American people in the last decade of the 20th Century and express the growing concern that changes in the Communications Act of 1934 are necessary to balance the needs of the cable industry with the need of cable consumers for reasonable cable service charges and improved technical standards. They provide, in addition, practical guidelines for changes in the regulatory structure contained in S. 1880.

Having voiced Hawaii's support of the overall thrust of the draft, the State offers the following specific comments:

1. We welcome the flexibility allowed the Federal Communications Commission and local franchising authorities to fashion regulatory schemes which seek to balance the interests of consumers, the cable company, programmers, and the public. Hawaii embraces the balanced, more uniform and responsible approach to ratemaking envisioned in the proposed criteria.

2. We consider critical the inclusion of new provisions relating to the affordability of rates and limiting the impact of acquisition costs for cable systems within a three-year period. This gives regulators needed authority to limit trafficking and profiteering by cable operators, issues that are of immediate relevance to Hawaii.

3. The draft's clear definition of "effective competition" offers a simple and workable means of determining when rate regulation becomes operative for given franchise areas and should reverse the negative effects of prior FCC inactivity. This is exceedingly important to Hawaii where so many citizens are unable to view television without cable because of our topography and tall condominium buildings.

4. We support the provisions which open and expand the number of cable channels to new commercial access programming opportunities, a concern which has surfaced repeatedly here in Hawaii.

5. The State's substantial concerns relative to horizontal and vertical concentration of market power are effectively addressed by the draft's provisions relating to "Limitations on Control and Utilization" and "Multiple Ownership."

6. The change in evidentiary standard for review of decisions to deny franchise renewals eliminates a presumption in favor of renewal of a cable franchise, a situation which has presented some difficulty to this State in renewal proceedings, and substitutes in lieu thereof a more balanced evaluation of evidence.

7. Removal of monetary liability of governmental officials and political entities for violation of constitutional rights effectively removes the threat to innovative decision-making and promotes the public's interest in diverse and timely communications.

8. Empowering the Federal Communications Commission to promulgate technical standards which reflect changing technology as well as the particular needs of the local cable community and cable system creates a positive, flexible approach to signal quality for the cable subscriber in a rapidly changing technological environment.

9. Requiring cable systems to carry a minimum number of qualified broadcast signals will correct the present imbalance in Hawaii which favors revenue generating cable programming over the carriage of broadcast signals.

Again, we fully endorse the draft Amendment to S. 1880. In this regard, we wish to underscore the importance of each element of the draft to the overall integrity of the proposed legislation. We would express our hope that all elements reach enactment in substantially the same form. To assist your subcommittee staff, we are attaching additional comments at Exhibit "A" which suggest language refinements only. Thank you for this opportunity to comment on this important legislation.

DATED: Honolulu, Hawaii, March 28, 1990.

Robert A A

ROBERT A. ALM
Director of Commerce and
Consumer Affairs

Exhibit A

1. Page 8, line 21

Unless there is a specific reason that the term "residential subscribers" and not just "subscribers" was used in the definition of "activated channels," we believe that the word "residential" should be deleted. The use of the term "residential subscribers" would exclude channels whose services are designed specifically for businesses. This in turn affects the determination of channel capacity for commercial use by persons unaffiliated with the operator.

For example, a cable company with 36 operating channels, dedicating one specifically for use by business subscribers and not generally available to residential subscribers, would by definition be considered a system having 35 activated channels and thus would not need to provide the 10 percent channel capacity for commercial use by unaffiliated persons.

2. Page 9, line 16

The definition of "basic cable service" as any service tier providing advertiser supported programming service may be too broad in scope. Nearly all satellite channels, including certain pay channels, allow for advertisements to be inserted in certain time slots, and are therefore supported by advertising to some degree. Which channels are generally included now as basic service depends on the proportion of their costs which are carried by advertising versus per subscriber charges. Those services which allow more advertising are carried at significantly lower per subscriber costs to the cable operators than those which have fewer advertising slots.

There are a number of possible effects the proposed language change could have:

1. If programmers choose not to alter their practices with respect to advertising, the new definition would shift a significant number of channels to operators' basic tiers, thus creating upward pressure on basic service rates.

2. Popular basic services (such as those carrying sports programming) which operators might consider changing to pay services, would likely remain on the basic tier because they would otherwise lose advertising revenues.

3. Per subscriber costs for those pay services which currently have some advertising would rise, because to remain pay services they would have to eliminate advertising. This would create upward pressure on pay rates.

To maintain the general contours of present programming practices, we would suggest the proposed language in Paragraph (4) be amended as follows:

> "(4) the term 'basic cable service' means any service tier providing programming services supported primarily by advertising or providing public, educational or governmental access channels or the retransmission of local television broadcast signals;" (Proposed language change underscored)

3. Page 13, line 18

We believe that it is not necessary to define "usable activated channels" because by having a definition for "usable activated channels," there must by implication be "un usable activated channels" whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission. If there are channels whose use would conflict with technical and safety regulations, should they be allowed to be activated at all? Perhaps the definition could refer simply to "activated channels."

4. Page 15, line 4

We agree that ensuring a diversity of programming sources should be a public policy objective. However, we believe subparagraph (B) should be deleted as a basis for ratemaking, because its inclusion could create unwarranted upward pressure on rates. Subparagraph (B) could be read to require the Commission to find reasonable any costs associated with the creation of new programming products. This could allow cable rates to be raised to cover the costs of programs which might otherwise be non competitive, e.g., even if the costs to produce such programs are excessive or the programming is a poor investment. Perhaps the concept found in subparagraph (B) might be placed instead in the section on LIMITATIONS ON CONTROL AND UTILIZATION, page 23, Section 8, which lists public interest objectives relating to potential anticompetitive practices with respect to programming.

STATEMENT OF IONA PALMATER, FOUNDER, FLORIDA ALLIANCE FOR COMPETITIVE TELEVISION SERVICES AND NATIONAL COORDINATOR, CABLE SUBSCRIBER BILL OF RIGHTS GROUPS

I. **INTRODUCTION**

A. Television and What It Means

Anyone who had access to a video signal of Tiananmen Square last year and saw what happened there has to acknowledge the impact television can have. No longer can a person say **"IT IS ONLY TELEVISION"**. Since that time we have witnessed history in the making from Europe. Americans have watched as citizens of other countries have strived for more freedoms. We are impressed with the spirit of democracy and its proliferation in many parts of the world. These telling stories of world happenings would not be possible without the satellite technology that exists today. While we are witnessing the development of democracy in other countries, many of us consumers feel the opposite is true in the area of telecommunications in America. As a nation we would be outraged if our government turned off the cameras as China's government did. We would all yell "It's our first amendment right, the free flow of information and freedom of the press must not be stifled". Why then in America are some of these things happening? It is not the government exercising control and domination, but rather a few vertically and horizontally integrated cable monopolies that are strangling the free flow of information.

Even though we live in an advanced telecommunications environment many Americans say they are finding it increasingly difficult to afford it in their homes. Prices have skyrocketed since deregulation. Many economically disadvantaged persons and those on fixed incomes find they are no longer able to afford cable prices. These individuals are effectively being taken out of the information, education and entertainment loop of video signals. At a time when it seems to me and many others that information and educational channels should be encouraged, just the opposite is happening and mostly because of greed.

B. Definition and Aims of National Cable Subscriber Bill of Rights Groups

Following the Cable Act of 1984 on 1 January 1987 there was an immediate increase in prices, and cable subscribers lost favorite channels. etc. Customers complained to their local municipality but were unable to receive answers. There was an apparent need for concerned and informed groups of individuals to work with municipalities and television viewers to understand what was happening to them and why it was happening.

Each group of individuals dedicated themselves and their members to provide accurate and timely information to both interested consumers and municipal leaders. Each group is dedicated to the free flow of information and the widest possible dissemination of educational and entertainment video services.

I was asked to serve as national coordinator of these groups in early 1989. Since that time I have worked with the organized groups and interested individuals in providing timely and accurate information to both consumers and municipal leaders. Citizens knew something was happening to them that was not right and they did not know quite what to do about it. These informed groups were able to assist and offer positive actions consumers could take.

A copy of The Cable Subscriber Bill of Rights which specifies the aims of all the groups is attached to this document. Of utmost importance to **all** groups is the protection of the First Amendment of The Constitution of The United States.

C. Definition and Aims of F.A.C.T.S.

I am the founder of the Florida Alliance for Competitive Television Services. I began F.A.C.T.S. in early 1989, after several years of being concerned and involved as a former cable subscriber.

I became deeply concerned about the effects deregulation of the cable industry was having on all consumers. Local officials in my own area were helpless to do anything to help their constituents. I knew this to be true nationwide also. In forming F.A.C.T.S. I dedicated myself and members who joined me in assisting municipalities and their constituents to work toward a fair and equitable solution through legislation which would provide reregulation and promote competition in the marketplace.

All members of F.A.C.T.S. are volunteers. no funds are collected and all expenses incurred are the responsibility of the individual.

As founder of F.A.C.T.S., my aim is to provide accurate and timely information to interested persons. F.A.C.T.S. is dedicated to the free flow of information and the widest possible dissemination of educational and entertainment video services.

II. GENERAL

A. Conditions Consumers Face in Florida

The issues I will relate are problems many Floridians and consumers nationwide are experiencing and these examples are intended as a sample. These problems are also a mirror of what is happening nationwide.

I became involved as a cable subscriber several years ago when I returned home after 5 years overseas. Cable was not available in my area at that time. Quite a few people in the neighborhood approached Warner Cable, who was already established in town and outlying communities nearby and asked for their service. We were told to get signatures on petitions to show how many citizens would sign up if it were brought to our residential neighborhood. It took quite a while, perhaps 2 years, but finally the system was extended to us. The service included C-Span which was one of the main reasons I wanted cable. My other reason was to improve the picture quality. I live in an area where video signals are not received very well with conventional VHF and UHF antennas.

Not too long after I became a subscriber, Warner Cable arbitrarily decided C-SPAN should share channel time and space with another service. I was disturbed, wrote letters and called the manager but to no avail. **The message was clear, even if the picture quality of their service was not. I could take it or leave it.** Quite a few other concerned residents and I were unsuccessful in having the channel reinstated full time.

The picture quality was poor, service went out in the evenings and when I called the service number I got a busy signal. If I ever was lucky enough to get through, answering service personnel were never able to tell me when it would be repaired. If it happened on a weekend you could just figure you were without service until Monday or Tuesday. Of course no refund was offered for that "down time". During this time I asked repeatedly when we could expect to get CNN services also. I was always told they didn't have the channel capacity. Finally I just told them to forget it and disconnected from their service. I went from cable subscriber to consumer advocate overnight.

To me it is ironic that all of my involvement in this issue is a direct result of this first unpleasant beginning with my home town cable system. I did not like having them take away a channel that I believed I would receive when I became their customer. If I pay for 7 day delivery of a newspaper, I expect it, I don't expect they will decide I really only wanted to read it 4 days a week and they could feel free to provide another service the rest of the week. As consumers of a product we have the right to believe we will continue to receive that product and if changes are to be made, it must be agreed upon by both parties. This was not the case. That was awhile ago and consumers are being treated the same way today. Nationwide--not just in my hometown.

I have learned a lot about cable monopoly and the plight of consumers since that time. Any one of millions of consumers of cable nationwide could relate a very similar story today. I continue working with local residents and officials regarding the local cable service but things have not improved for consumers. Only one channel is allocated to the C-SPAN service. Local subscribers still do not receive C-SPAN II. Warner Cable still has the franchise locked up in our area and will have for many years to come, just as MSO's do nationwide. Last year the capacity of the service was 21 channels, but in early 1989 a "new improved system" was installed and was widely publicized that capacity would be 60 channels. I have learned to know the difference between capacity of a system and what they actually provide. On the new 60 channel capacity system consumers in the greater Crestview viewing area receive only 30 channels basic service. Consumers saw their prices go from $11.95 to $15.20 for basic service in early 1989. The price of a premium outlet (not the service-just the outlet) increased from $5.25 to $6.95, and a remote control cost $3.95. To local officials and many of us consumers it seems this new system is more cable friendly than it is consumer friendly. Consumers and city officials asked publicly what the increased channel capacity meant to the consumer. Warner Cable was prepared to carry only a few more channels. The expansion of the system and the increased number of channels did little to benefit the subscriber. Those extra channels are evidently being saved for more pay-per-view and "money making channels" for the Time-Warner parent company. There is no competition for cable in my hometown and that is true nationwide in 99% of the cases.

Consumers recently received a letter with their cable bills stating that programming costs had increased 76% during the past year and there was an increase of 1,484.6% in fees to be paid to the copyright tribunal. The new price increase began March 1, 1990. Most area customers saw their basic service go from $15.20 to $15.75 and the franchise fee was broken out on top of that and listed separately for the first time. Effectively the bottom line increase to consumers was 9.6%. Consumers want to know why costs are so high when Time-Warner itself owns wholly or in part most of the programming. They believe they are having their prices raised to pay for the merger of Time-Warner several months ago. I agree with them. To my knowledge no new copyright legislation has even been introduced that increases fees paid to the Royalty Copyright Tribunal.

B. Nationwide Findings and Conditions

For the past year I have acted as the coordinator for a national grassroots movement, The Cable Subscriber Bill of Rights Groups. Through these groups and other concerned consumers, 520 cities, representing a population in excess of 5,172,500 people have passed resolutions or have policy agendas petitioning Congress to re-visit the Cable Act of 1984 and bring effective competition in and out of cable areas. The National Farmers Union just a few days ago adopted a resolution supporting the positions in our subscribers bill of rights. The Oklahoma Municipal League unanimously passed a resolution supporting our aims. Thousands of consumers have also signed petitions which have been forwarded to Congress. This testimony includes a complete list of cities with populations submitted for the record.

Consumers nationwide have many complaints. I have heard from them in almost every state, including Texas, Tennessee, Massachusetts, Louisiana, Virginia, Alaska, Wisconsin and Washington. Evidence from Juneau, Alaska relates some of the highest prices paid for basic cable, and syndex is another problem in that area that regardless of who wins consumers loses.

Most often heard complaints from cable subscribers nationwide include:

1. Arrogance of cable company and the "take it or leave it" attitude.

2. Consumers are tired of being held hostage by their

cable monopoly. They resent that cable has never had to compete for the consumer dollars.

3. Consumers are insulted to read that the new voluntary cable TV guidelines may bring more increased prices. Consumers feel if their local cable company had to compete in the marketplace for their service, the guidelines would have been there all along. No other company can stay in business without giving good service, but cable does and makes billions at the same time.

4. Consumers say they receive poor customer service, poor repair service, service is undependable and often they lose many hours from their jobs because the cable company does not have appointments or certain hours they promise to be at your home.

5. Customers say every time it rains service goes out and is out for days before it is repaired.

6. Consumers are angry because they lose favorite channels after they become customers. They have no choice except discontinue service or take what's left.

7. Customers complain of losing channels when the channel is being test scrambled. The channel will announce certain testing hours and tell the consumer if they have difficulty to contact their local cable company. When scrambling begins the cable customers channel goes blank. The consumer calls the cable company but it does not result

in a solution. In the Soldiers and Airmans Home right here in Washington on Capitol Street, the residents have had this problem repeatedly with FNN. This has been going on since last November. **Veteran residents of the home**--are told that the part has been ordered but when it comes in it was needed worse somewhere else and they will work on the problem. When I last spoke with a resident a few days ago he told me this was still going on and his channel is still blank, but his price for service has not decreased and no refund has been discussed. Because many of the residents rely on television as their link with the outside world every effort must be made to correct this quickly. I have called the number of Veterans Cable several times but have received no return calls or either the line was busy.

8. Consumers complain of loss of their favorite superstation that has been taken off systems in favor of WTBS because of the TCI control. When TNT made it's grand debut with millions and millions of subscribers on launch day, many favored channels were lost to consumers. Subscribers feel that TNT was given preference because of ownership connection to the giant media conglomerates.

9. Subscribers have suffered constant increased cable prices since deregulation became effective. In my own home state of Florida some systems have seen exorbitant price increases. Some boggle the mind. It is the same in all states also.

III. COMPETITION

A. Would-Be Competitors-Overbuilders

Since July 1989 Cosmic Communications, a small independently owned company has been in direct competition to Warner Cable on Eglin Air Force Base, about 25 miles from my home. Cosmic offers 44 channels of basic services. There are no additional charges for outlets, no charge for remote control and no converter box is required. In areas where there is direct competition Warner has reduced its price and does not charge for remote controls. For the Cosmic basic package of 44 channels consumers pay $6.95. They also charge $6.95 for each of the premium services they provide. Consumers are very pleased with their service and have nothing but praise for their professionalism and services.

To meet this competition Warner Cable has reduced its price to $6.95 also, does not charge for remote controls and offers free hook-ups and one day service. Their basic package consist of 36 channels. Many consumers who receive the identical service provided by Warner on base, but who live off base where there is no competition have to pay Warner Communications $16.22 plus tax. Consumers are up in arms about the discrimination and are writing letters to municipal leaders, newspapers and to federal legislators asking that something be done. Why should consumers who receive identical service from the same company pay so much more?

Warner Cable has assured angry subscribers that those paying higher prices are not subsidizing the lower prices that exist on Eglin Air Force Base. What, then is going on here? They are forced to pay more simply because there is no competition. How much more plain does it have to be? Of course local officials are helpless in the matter because now they have no control at all since Cable Act of 1984.

The local manager of Warner Cable has stated **publicly** that sooner or later one company will buy out the other. Now guess who will buy who when that happens. The entrepreneur stands very little chance of survival in this type of marketplace. What is even more ironic is that for Cosmic to be in business, it has to buy much of its programming from its competitor--Time-Warner.

Orlando, Florida and the greater viewing area has experienced many problems which are mirrored in the examples described about competition between Cosmic Communications and Time-Warner in Northwest Florida. The competitor, Telsat Cable continues to have extreme difficulty getting programming. I have not gone into their individual problems as I know they are a witness and will be submitting voluminous testimony. Consumers resent discrimination and being charged more in areas served by only one wire simply because cable has a monopoly status. Effectively the attitude is **TAKE IT OR**

LEAVE IT. That is truly the national attitude of this unregulated monopoly.

In Hollywood, Florida approximately one year ago cable viewers lost WGN, thereby losing the Chicago Cubs baseball games. Consumers were outraged, public meetings were held due to the public crying foul and there was even talk about trying to set up a delayed basis for the games via tape, but ultimately the consumer lost.

Various analyses throughout Florida and other states are attached to this testimony showing price increases to be a widespread problem for all consumers. Similar conditions and problems could be related describing many other cities and communities, but these are representative of the problems that exist.

B. Alternative Technology (TVRO)

No group of consumers has ever been singled out for more discriminations in the marketplace than have dishowners. Consumers who use satellite dishes (TVRO) have as many, if not more, complaints than cable subscribers and the problems are caused by the same companies. It is necessary to see the link and stranglehold that the cable monopoly enjoys nationwide to see the connection. For instance T.C.I and Time-Warner exercise such control and power over the video media that they are like the 800 pound gorilla. If you want to receive service you must do business with them. Dishowners, after spending considerable sums for their system, which is essentially a cable headend to them are having to pay even more for video services. They are subjected to the monopoly situation as it relates to the decoder, consumers are seeing prices for it spiral ever upwards and the new Videocypher II Plus now introduced seems to be the "brand new defacto standard" and is not compatible. This means the customer must pay again for the upgrade. They need to know when they can quit paying for General Instruments' foulups.

HBO, CNN, Superstations and any other service available to them are costly and they also must pay a year in advance in most cases. Subscribing is difficult, they have to call many 800 numbers, and many times they find services are denied to them simply because of where they live and because they choose -or need- the alternative technology.

Consumers of alternative technologies are treated unfairly. This creates even more concentration of power for the MSO's and programmers, who are most often the same companies. If a person wants to use an alternative, he finds things so costly that he decides it's not worth it and will wait for cable to pass his home or do without. That is what keeps the consumer under control. Cable is keeping a tight rein on the technologies and therefore controlling the people nationwide by their unfair and anticompetitive pricing to the alternative technologies.

IV. COMMENTS AND OBSERVATIONS

A marketplace needs competition at fair and equitable prices and from a multiple of sources to thrive and be a healthy environment for all consumers. In the long term all segments of our society are strongest when all consumers are treated fairly. Consumers need competition in the marketplace of video services. If that competition cannot thrive, then the alternative is to treat the cable industry as a utility and place controls and restraints on it. We don't allow other industries to enjoy the monopoly status that cable has had since its inception.

Currently a number of bills in Congress address many of the issues consumers are raising. To the best of my knowledge the cable industry does not support any of them. I think it is painfully clear why. Cable wants to own and control all of the technologies now and are making plans to own and control the next generation also. T.C.I., Time-Warner, Cablevision and a few others are currently making plans to own and control direct broadcast satellite (DBS). This continued proliferation of power in the hands of so few has anti-trust implications to me. I am not alone in this belief. Many people from all walks of life are greatly concerned. I am especially concerned because **I see the public airways being turned into private real estate. Our airways are a finite resource placed in public trust and it is not right for them to be treated in this selfish and greedy way. They are not a piece of furniture to be bought and sold to the highest bidder with no concern for the public interest.**

The deregulation of the cable monopoly, while it may have been well intentioned, has not benefited consumers. Consumers are not well served in the existing environment. It was anticipated that deregulation would create competition in the marketplace. Members of the committee on behalf of all consumers, the marketplace is not working and for good reason. **THERE IS NO MARKETPLACE.** How can there be a marketplace when there is only a monopoly to do business with? Any of us who have played the game of monopoly know the game is over when one player owns it all. All others are forced to concede the end of the game.

Consumers of the conventional hard wired cable systems are at the mercy of the large MSO's. These MSO's all have an unwritten law, they will not compete with each other.

Franchise agreements are made for long terms, sometimes 15 and 20 years, effectively locking up the market in those areas. The consumers in the franchise area must either take the service and channels offered or do without. There is no alternative cable system for them in 99% of America.

The intent of the cable deregulation act was to allow competition from alternative sources. Those sources like satellite dishes (TVRO) and multiple microwave distribution systems (MMDS) are now in place and could offer competition but are being stifled by the control of the cable cartel. These technologies are being snuffed out by unfair and anticompetitive practices. Members of the committee have heard from leaders of these would-be competitors. The testimony I have heard causes me to ask, how can a marketplace develop and compete in such an atmosphere?

I know everyone does not want to be a customer of hard wired cable services, nor does everyone want to be a satellite dish owner. What consumers expect in an unregulated and competitive marketplace is **CHOICE**. If access to programming and nondiscriminatory pricing through independent third parties were assured through legislation, the alternative technologies could flourish almost immediately and start offering true competition. They would spring up overnight like flowers after a spring rain. Current market conditions will not allow this to happen. That is the reason for the stranglehold on them. Programming and access to it even at inflated prices is difficult. Consumers of America--all of us--whether on cable or not, would benefit most if a level playing field were available to all. **For a marketplace to develop properly video services must be available from a variety of sources.**

While satellite dishes and MMDS are currently trying to compete as alternatives and some overbuilders are trying to compete with conventional cable in select areas they are all at the mercy of the large media conglomerates and their programming. On the horizon are other competitors. There is a place in the sun for all of them. If each were treated fairly, the marketplace would determine who stayed and who went, but the way it is now, that decision is made for them by the existing monopoly. They simply stifle all competition.

An often overlooked problem with regard to cable television is the manner in which our entire society is skewed in favor of using the local monopoly system. In many cases there are codes, covenants and restrictions (CC&Rs) which entire housing developments are using. When a person is moving either to an apartment or a new home for instance, the cable company has already been in working with the builders at the same time the water and electric company have. The home is being wired as if cable were indeed like a utility. If people rent they face the same restrictions. The "system" is effectively saying to everyone, this is the means you must have to receive television in your home. Many people would use a conventional VHF and UHF antenna if their communities allowed it. While I know that is a slightly different slant on the problem, it is nevertheless part of the problem for the consumer. I don't resent that cable prewires the homes, because it makes perfect sense from a business standpoint, but it does give the cable priority to the customer. That is not alright with me if we are in an unregulated mode. If that is the way cable is needed to function to serve Americans and provide a service the public wants, then perhaps reregulation will be necessary.

The cable industry has been in existence now for many years. I find it hard to buy the story that their industry is just an adolescent. If that is true, perhaps the adolescent should have some parental guidance until it matures.
If a fair and equitable form of legislation promoting competition cannot be forthcoming then it is time to reregulate the cable industry and treat them in a utility status. I believe all consumers would be best serve by true, viable competition and a level playing field.

STATEMENT OF PAUL G. BERRA, PRESIDENT, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

HEARING ON S. 1880, CABLE TV CONSUMER PROTECTION ACT
SUBCOMMITTEE ON COMMUNICATIONS
COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION
UNITED STATES SENATE
APRIL 4, 1990

Mr. Chairman and Honorable Members of the Committee:

I. INTRODUCTION

My name is Paul G. Berra. I am the elected president of the National Association of Telecommunications Officers and Advisors (NATOA). I am also the Cable Communications Manager for the City of St. Louis, Missouri. I am pleased to have the opportunity to present this statement on behalf of NATOA, which represents the professional employees of local governments responsible for regulating cable television operators and cable franchises. Our membership includes employees of small towns, large cities, counties, regional governments and local joint powers authorities created to administer cable television franchises.

I respectfully request that this statement, including all of its attachments, be printed in its entirety in the record of these hearings.

NATOA, an affiliate of the National League of Cities, serves as the expert advisor to the League on telecommunications issues, and is the repository of the experience of the front line civil servants charged with protecting cable consumers. This is a day-to-day challenge, and often a frustration, given the imbalance created by the Cable Communications Policy Act of 1984. The National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties have each used NATOA's expertise in shaping their respective policies calling for significant reform in federal policy as it affects the cable television industry. On behalf of NATOA, we fully support the current National League of Cities policy, adopted in December, 1988, calling for a comprehensive revision of the federal Cable Act. Essentially this same policy is replicated in the resolutions of the U.S. Conference of Mayors and the National Association of Counties.

Local cable franchise regulators in the cities, towns, and counties of this nation know the community benefits of local narrowcast television services. We also understand how the cable television industry functions -- its strengths and weaknesses. We carry the primary responsibility for overseeing cable television operator behavior. It is our job as cable regulators to ensure that cable is responsive to the specific needs of our individual communities.

My statement today will address three areas. First, the legislative proposal before the Committee is an advancement over current federal law governing cable television in that it promises increased competition in television services. Second, the Staff Draft contains a strong and inappropriate anti-local franchising bias and appears to reject the need to consider local community needs and interests in cable regulation. Third, several specific changes are needed to develop a real federal-local partnership to better serve cable subscribers.

II. SENATORS DANFORTH AND GORE HAVE PROPERLY DEFINED THE GOALS FOR REFORM OF THE CABLE ACT 1984.

Senator Danforth deserves enormous praise for his leadership in proposing progressive regulation to restore balance in the marketplace in cable television. As a Missourian, I am particularly proud that my Senator has taken the national lead in this essential effort.

Overall, NATOA is strongly supportive of the thrust of the various legislative proposals pending before the Committee. In earlier submissions to the Committee Staff, the National League of Cities, and the U.S. Conference of Mayors presented detailed information on the specific areas of reform needed to the Cable Act. In summary, NATOA believes reform should serve four goals. First, it should protect consumers against monopoly pricing by cable operators. Second, it should insure cable systems are designed and operated to meet the needs of the local community. Third, it should encourage competitive alternatives to the cable monopoly transmission system. Fourth, it should enhance competition among television programmers. These four goals are discussed in greater detail in the attachment to my testimony, entitled "14 Municipal Recommendations for Cable Act Reform."

NATOA believes the legislative proposals introduced by Senator Danforth and by Senator Gore took major strides toward reaching all four of these goals.

On the other hand, the Staff Draft fails in significant respects. I score the Staff Draft as fifty-percent. It does provide significant relief for the problems faced by television programmers seeking access to cable systems and by alternative television delivery systems seeking access to programming now available only on cable. However, the Staff Draft fails to recognize an essential element of any comprehensive cable television policy reform. It errs fundamentally in its strident bias against local participation in oversight of the cable television industry.

III. SUBSTANTIAL GOVERNMENTAL INTERESTS ARE SERVED BY LOCAL CABLE TELEVISION FRANCHISING.

The Committee has the opportunity to create a positive and constructive partnership between local and federal regulatory authorities in cable television. The federal government has always recognized the importance of local oversight of cable operators. This was the essence of the rules promulgated by the Federal Communications Commission in 1972. This policy was ratified again by Congress in the Cable Act of 1984. And it has been repeatedly sustained by the federal courts since then, as recently as January in a district court in Los Angeles, California.

Cable has always been a locally tailored medium. Cable should not be nationally uniform or federally ordained. It should be configured to the local landscape and population.

A cable system is by its very nature a local communications system which is built on and permanently occupies local public property and rights-of-way. This is the most valuable real property the public owns. Cable's physical occupation of that property extends throughout a community. Cable reaps enormous commercial benefits from its physical occupation of public property at a rental price far below the true market value of the property rights it receives in a franchise.

Local regulation is part of the price cable should be expected to pay as fair payment for the use of this public property. It is the job of Congress and local government to assure this local regulation serves the public well.

Local franchising serves a broad array of substantial governmental interests. Let me enumerate the purposes served by local franchising.

Universal Availability of Service. It has long been a concern of local governments that all citizens, regardless of income or location, have the opportunity to avail themselves of services provided to the public through the public's own rights-of-way. These services include water, gas, electricity and telephones. Since cable has been deemed to be of sufficient public benefit as to be granted use of the public rights-of-way, it, too, should be subject to locally-imposed universal service requirements. Moreover, without universal availability of cable service, the Congressional goals of promoting diversity of views and information and local origination of programming become virtually unattainable. That goal is not served when these opportunities are available only to a particular segment of the population.

Furthering Diversity of Views and Programs. A local government has a strong interest in developing an educated and informed citizenry through furthering diversity of views and programs. Cable television can assist in this through the set-aside of channels for public, educational and governmental (PEG) use. The public access channels can provide a local electronic soapbox, as well as allow access to the medium by women, minorities and other under-served segments of the population.

Local governments have traditionally sought an educated and informed citizenry through establishment of public school systems, including higher and vocational education, public libraries, museums, etc. Cable television has the ability both to provide a wide variety of information and to bring education and vocational training directly into the homes of persons who might not otherwise have access to these opportunities.

The participation of the community in its governance is the bedrock of this nation. Such participation is sought through thousands of federal, state and local government requirements for public notice, public hearings, citizens' advisory groups, open public meetings, public access to governmental records, jury trials, etc. Public access cable television is an important method of promoting that community participation, both through local origination programming and through broadcast of local governmental activities, such as city council meetings.

Effective Management of Limited Public Rights-of-Way and Facilities. Like electric utilities and telephone companies, cable's occupation of the public rights-of-way and private property easements is permanent in that it lasts as long as the cable company does. Local public officials are required to manage the utility infrastructure, to plan for future as well as present uses in light of the available space.

Fair Compensation for Commercial Use of Public Property. Public rights-of-way are created through the expenditure of public funds, and are often obtained through local exercise of eminent domain. They are held and managed by local governments in trust for the public. The imposition of fees or rents on gas, electric and other utilities, sidewalk cafes, underground vaults, concessions, marinas, and business uses that occupy public space are time-honored manifestations of this obligation. Like any property owner, the public is entitled to fair compensation for private use of its property for commercial gain. No traditional cable system could ever be built without access to this property, and to the adjacent utility easements in private property.

Local Economic Development. Economic development and the provision of jobs have long been concerns of local governments. Cable can facilitate industrial and business development activities in a variety of ways, over and above the jobs it creates directly. For example, it can help meet the increased business demand for interactive, two-way conferencing and high-speed data transmission. It can also assist in the provision of services considered necessary by business.

Regulation of Monopoly Providers. Government has long recognized the need to regulate for the public good monopoly providers of public services such as electricity, gas, water and sewage disposal, along with providers of transportation. Some of this regulation is federal, some state and some local. Regulation is most pervasive when/where the service provider enjoys a natural monopoly, which cable television does nearly universally. Such regulation is often local where the service provided has significant local impact, such as with public transportation. Cable television, which occupies public rights-of-way throughout a given locality and physically comes into the subscriber's homes, has a significant local impact.

Consumer Protection. Consumers look to the local officials who grant franchises for help with widespread complaints about cable rates, operations and practices. Franchise authorities' ability to deal effectively with consumer problems is substantially impaired if they do not fulfill a necessary rate in the rate regulatory process or if denial of renewal, revocation of franchises and other appropriate actions remain largely illusory remedies. The FCC will never be able to effectively monitor the over 8,000 cable systems in this country in sufficient detail to afford to cable consumers the appropriate level of consumer protection. Local franchising authorities must have an appropriate role in protecting cable subscribers.

Technical Quality of Cable Operations. Franchise authorities have an interest in assuring that cable television signals of the best possible technical quality are provided to subscribers. Picture quality and reception are among the most frustrating, and persistent, problems cable subscribers encounter. Franchise authorities, if they are to fulfill their trust to their citizens, must be enabled to enforce meaningful signal quality. The FCC will never be able to efficiently or adequately police cable signal quality across the nation.

Public Safety. Local governments must ensure that construction, clean-up, restoration and maintenance of equipment, in the streets, rights-of-way and underground conduits do not endanger the public, that safety, fire and health codes are followed for installation and operation, and that community inconvenience, such as traffic disruption, is minimized.

Environmental Protection. Reduction of visual blight, preservation of historic sites, and other environmental matters are traditional local concerns. These are impacted by the manner of cable installation; by the appearance and extent of cable television wires, pedestals, and other equipment; by restoration of sites after construction; and by other factors. Treatment of cable in this context is consistent with the treatment of utilities, other non-utility businesses, and property in general.

Affirmative Action/Minority Ownership. State and federal law requires local governments to improve economic opportunities for women and minorities, including business ownership and employment. The cable franchising process is one of many ways these policies are implemented.

IV. ADEQUATE LOCAL AUTHORITY IS REQUIRED TO SATISFY THESE SUBSTANTIAL GOVERNMENTAL INTERESTS.

Without sufficient regulatory authority over cable systems, local governments will be severely handicapped in attempting to address these traditional and important goals and interests. Reposing the necessary regulatory authority in the Federal Communications Commission will not suffice. No matter what general rules it might promulgate, the Commission can never have the time, budget, manpower or expertise to assure that each of the more than 8,000 local cable systems in this nation is fulfilling the policies enumerated in the Cable Act. Equally important, without local regulatory authority, a medium of expressing and addressing local as well as national concerns will become a medium of expressing national concerns only.

In other words, we ask that the Committee not discard the narrowcast benefits of this cable technology. Cable is different from all other video technologies in its ability to serve very small audience segments at very low cost. Please don't deprive individual communities of the ability to require the cable operator to adapt this technology to serve real local needs.

There are many examples available to the Committee to show how different franchise authorities throughout the nation are making creative use of franchising for the benefit of their local citizens. In Austin, Texas, there is an elaborate, award-winning and strongly supported community access programming. Austin also has developed a police communications network that is using part of the cable system. In Montgomery County, Maryland, the county is transmitting governmental data as well as video between its major local governmental centers. In North Carolina, the state has conducted an extensive demonstration project using cable technology to deliver medical and social services in rural areas. In the greater Los Angeles area, public access channels have become an important outlet for showcasing experimental, independently produced videos for creative talent in the film industry. In Kenton and Boone Counties, Kentucky, twenty-five jurisdictions are able to show their city council and local governmental news over the cable system. These two counties, which are in the suburban Cincinnati Region, are finally getting adequate video media coverage of their local community interests. In Torrance, California, several different Asian ethnic groups are using the community access channel to communicate cultural and information programming to their members. In the St. Louis metropolitan region, a consortium of colleges has developed a higher education telecourse system that is widely viewed and a source of major additional funding for the colleges. In Laredo, Texas, the cable franchise requires the carriage of relevant

Mexican and Spanish programming which is essential to that community. In Washington, D.C. cable television is now providing coverage of local government activities at a level that simply was not possible by the television outlets within the community.

V. A FEDERAL-LOCAL PARTNERSHIP IS NEEDED TO REALIZE THE FULL POTENTIAL FOR CABLE TECHNOLOGY.

The local community interests in cable television are real. So is the need for a consistent national policy with respect to cable television. In other words, there is a need for a creative and dynamic partnership between the federal level -- the locus of governmental expertise in communications technology and national communications policy -- and the local level -- the locus of expertise in local community needs and interests.

Most local elected officials, and certainly all of the members of NATOA would appreciate and adhere to national standards on what to expect of local operators, provided these standards can be modified when local needs dictate. It is a reality that most of the 20,000 communities franchising cable, do not have and cannot have full-time, expert cable oversight staff. The vast majority of franchising communities are expertise and information poor when it comes to cable television. For all of these communities, national standards and guidance would be welcome and would undoubtedly raise the standard of performance by the cable operator in a large number of communities across the face of the nation.

In addition, the industry, consumers, and franchising authorities all need guidance as to reasonable minimum levels of service to expect from cable operators. The failure to have such standards is largely to blame for the fact that so many rural communities today are still suffering from ancient cable systems. These systems still offer 12 to 24 channel capacity. And, as high definition television programming becomes a reality, a coherent national policy is necessary to avoid the risk of limited cable system capacity again reemerging and permitting the cable industry to remonopolize programming through monopsony pricing of limited cable transmission channels.

VI. THE STAFF DRAFT SHOULD BE MODIFIED TO IMPLEMENT A FEDERAL-LOCAL PARTNERSHIP.

The primary error in the "Staff Draft" is its anti-local franchising bias. This is reflected in several different places. I will confine my comments to four specific examples which must be corrected to restore an appropriate balance to the mutual responsibilities of local and federal authorities.

The most important failing of the "Staff Draft" is its abandonment of Senator Danforth's renewal proposal in favor of the existing renewal language of the Federal Cable Act. Cable franchising renewals are not functioning as Congress intended in 1984. Cable operators must face the realistic possibility of losing their licenses if they do not perform as promised. Yet it is nearly impossible to refuse renewal under the current structure of the Cable Act. The "Staff Draft" deletes the renewal modification language originally proposed by Senator Danforth. Franchise renewal must assure best available technology and customer service in future years. The draft deletes this opportunity for cities.

The second major flaw is the Staff Draft's failure to require the FCC, in setting national rate regulation standards, to factor in local needs and interests. The draft fails to structure a constructive relationship between federal regulators setting cost-based rates for basic cable services and local franchising authorities setting capital and operating cost requirements on operators. These costs do vary dramatically from community to community. Failure to coordinate local and federal decisions runs the risk of federal standards being based on unrealistic expectations and inflexible judgments about the essential costs in constructing a cable system.

Additionally, local governments should have the authority to establish a "life line" service for low income consumers that contains the basic over the air broadcast signals and public, educational and governmental services.

The third flaw in the Draft is its failure to make local regulators partners with federal regulators in overseeing the technical signal performance of cable operators. Local regulators need discretion to modify federal standards to meet demonstrated local needs. The Draft proposes to preempt all local franchising authority to enforce cable contracts with respect to reasonable signal quality, the most serious and frequent customer service complaint. This is a dramatic reversal of the original language proposed in the Danforth Bill.

Fourth, the Draft fails to deal effectively with telephone involvement in cable television activities. The Bill fails to permit telephone companies to be cable television providers. This is a mistake. Individual communities should have the opportunity to allow telephone company entry when they so choose. In the "video dial tone" section that is contained in the "Staff Draft," the language fails to require that telephone companies offering narrowcast transmission services be subject to local oversight or coordination with local community needs and interests. It may not be necessary to subject "video dial tone" services to the full range of local franchising when those services are offered under tariffs regulated by state public utility commissions. At the same time, common carrier offerings should not be permitted to undercut or ignore the local community needs and interests that are furthered by franchising. Video tariffs filed by the common carrier must provide services that are equivalent to those provided under the franchise regime.

VII. CONCLUSION

Throughout the 1980's, the Federal Communications Commission refused to exercise its authority to restrain cable's monopoly prices and practices. That left the entire burden on local franchise authorities. This has been a frustrating experience for all of us at the local level. Often we function with partial or inadequate information because there is no national standard for comparison. Often we learn about the technology and economics of the industry in negotiations with experts from the cable industry who know much more than the city negotiators and regulators. And often we are challenged in court by lawsuits seeking to intimidate the effective exercise of local jurisdiction that the 1984 Cable Act intended us to have.

The 1984 Cable Act experiment has devastated consumer pocketbooks. The local franchising authorities were not then, and are not now the villains. We want to serve our constituents just like you as elected members of Congress do. The 1984 Cable Act distorted the marketplace for cable television services. It gave cable investors essentially free and permanent use of very valuable public property -- the public rights-of-way. This give-away of public property at a small portion of its true value has advantaged cable operators over all their video distribution competitors. The best way to restore fair treatment to television consumers is to demand that cable operators accept reasonable public interest obligations. These public interest obligations are largely a function of local community needs and interests. These are essential in all phases and stages of federal standards adopted and applied to the cable television industry.

On behalf of both NATOA and the City of St. Louis, I want to thank you for your time and interest in this issue. We stand ready to work with you and your staff to develop the details in this legislation as you give it further consideration.

STATEMENT OF THE NATIONAL ASSOCIATION OF COUNTIES

County governments have become more and more involved in the franchising of cable television services. With increased involvement in this area have come the problems connected with cable television. It is for this reason that NACo at its recently completed Legislative Conference adopted a detailed policy resolution of cable television legislation. The resolution is attached to this statement.

NACO believes that Congress ought to enact a law which will enhance the ability of local franchising authorities to protect the interest of consumers. Under current law, the franchising authority has little control once it grants a franchise. Under the effective competition definition counties have no real ability to set rates. NACo believes that a franchising authority must have the authority to undertake rate regulation in the absence of effective competition from another cable operation or multi-channel video progamming distributor. While the Committee staff draft bill does allow local regulation, it needs to be clear that local authorities have some flexibility in setting rates. This means considering past rate increases, the cable operator's compliance with the franchise agreement, the operator's responsiveness to its subscribers, its quality of service, etc. The bill also needs to be clear that such authority cannot be revoked for minor infractions. Further, a process needs to be spelled out concerning how a local authority can regain its ability to regulate if it was revoked.

Aside from regulating rates, counties must also have some leverage over the cable operator to guarantee good service to the subscribers. NACo believes that the bill takes the first step by having the FCC establish minimum techinical standards. In addition, local governments must be able to regulate and enforce technical standards which reflect local conditions. They must also be able to terminate an operator who consistently provides bad service and be able to review and approve a transfer of a franchise.

Finally, and perhaps most importantly, the renewal of a franchise must not be automatic. The citizens of a county deserve the best cable service possible and if the incumbent is not delivering such service it only seems appropriate that other bids from cable operators be solicited. Furthermore, the judicial review section must not create a situation where local governments will find themselves facing legal challenges costing hundreds of thousands of dollars when they deny a renewal. Without such protections, franchise authorities have little leverge over cable operators and little ability to ensure good service.

A problem that many counties face is that the rural sections of a county are not serviced by cable operators. Federal policy must be developed to encourage cable service to residents of rural areas, including the requirement that universal service be provided to the entire county.

Finally, NACo members believe in competition. Greater competition in cable should mean better service at lower rates. We believe barriers to competition should be removed and capable providers, including telephone companies, should be allowed to provide video services so long as all providers area subject to the same local government franchising requirements and fees as cable operators.

STATEMENT SUBMITTED ON BEHALF OF DEAN SWANSON

CHAIRMAN OF THE BOARD

UNITED STATES TELEPHONE ASSOCIATION

MR. CHAIRMAN:

MY NAME IS DEAN SWANSON, I AM SUBMITTING THIS TESTIMONY ON BEHALF OF THE UNITED STATES TELEPHONE ASSOCIATION FOR WHICH I SERVE AS THE CHAIRMAN OF THE ASSOCIATION'S BOARD OF DIRECTORS. I AM ALSO PRESIDENT OF STANDARD TELEPHONE COMPANY LOCATED IN CORNELIA, GEORGIA.

THE UNITED STATES TELEPHONE ASSOCIATION, OR USTA, IS THE PRIMARY TRADE ASSOCIATION OF THE LOCAL TELEPHONE INDUSTRY. THERE ARE 1,359 LOCAL TELEPHONE COMPANIES IN THE UNITED STATES, OF WHOM MORE THAN 1,050 ARE MEMBERS OF USTA. USTA'S MEMBERSHIP INCLUDES EACH OF THE LARGEST 33 LOCAL TELEPHONE ORGANIZATIONS, AND ALL BUT TWO OF THE LARGEST 50. EACH OF THE BELL OPERATING COMPANIES DIVESTED BY AT&T BECAME A MEMBER OF USTA AT DIVESTITURE. THE MEMBERSHIP OF USTA INCLUDES NEARLY 1,000 QUITE SMALL TELEPHONE COMPANIES, EACH OF WHICH SERVES LESS THAN 20,000 LOCAL ACCESS LINES. USTA ITSELF HAS ROOTS THAT STRETCH BACK TO 1897.

THE BELL OPERATING COMPANIES SERVE APPROXIMATELY 78% OF THE LOCAL TELEPHONE ACCESS LINES IN THE UNITED STATES, BUT ONLY 41% OF THE GEOGRAPHIC AREA. THUS, THE NON-BELL LOCAL TELEPHONE COMPANIES PLAY A VERY LARGE ROLE IN THE DELIVERY OF LOCAL AND LONG DISTANCE SERVICE IN THE UNITED STATES. IN TEXAS, FOR EXAMPLE, THERE ARE ABOUT 60 LOCAL TELEPHONE COMPANIES. OF THESE, ONLY SOUTHWESTERN BELL TELEPHONE AND U.S. WEST COMMUNICATIONS (IN EL PASO) ARE SUBJECT TO MODIFIED FINAL JUDGMENT RESTRICTIONS. THE REST VARY WIDELY IN SIZE FROM SUBSIDIARIES OF OUR LARGEST NON-BELL MEMBER, GTE, DOWN TO SMALL COMPANIES WITH UNDER 100 LINES.

THERE ARE USTA MEMBER COMPANIES WHICH HAVE NOT BEEN DIRECTLY CONSTRAINED BECAUSE OF AT&T'S DIVESTITURE DECISION HAVE ELECTED TO DIVERSIFY INTO LONG DISTANCE, MANUFACTURING, INFORMATION SERVICES AND OTHER AREAS. THE ENTRY OF THESE LOCAL TELEPHONE ORGANIZATIONS HAS CONTRIBUTED TO THE DIVERSITY AND COMPETITIVENESS OF THESE MARKETS WITHOUT ANY RESULTING DIMINUTION IN THE QUALITY OF LOCAL TELEPHONE SERVICE.

AS THE NATIONAL TRADE ASSOCIATION OF ALL LOCAL TELEPHONE COMPANIES, WE ARE SUBMITTING THIS TESTIMONY IN SUPPORT OF THE LEGISLATIVE EFFORTS OF CHAIRMAN HOLLINGS IN S. 1981 TO FREE THE BELL OPERATING COMPANIES TO MANUFACTURE AND TO PLACE ON RECORD OUR POSITION WITH RESPECT TO BOTH MANUFACTURING AND INFORMATION SERVICES.

I. INFRASTRUCTURE CONSTRAINTS

BEFORE I ADDRESS THE SPECIFICS OF S. 1981 AND MFJ LEGISLATION GENERICALLY, IT WOULD BE HELPFUL TO OUTLINE THE BROADER CONTEXT INTO WHICH SUCH LEGISLATION FITS -- NATIONAL

INFRASTRUCTURE DEVELOPMENT IN THE PUBLIC SWITCHED NETWORK..

NTIA HAS UNDERTAKEN AN INQUIRY INTO TELECOMMUNICATIONS AS ELEMENT OF THE NATION'S INFRASTRUCTURE. THE IMPETUS OF BOTH THI INQUIRY AND THE MFJ LEGISLATIVE EFFORT IS A GROWING AWARENESS THAT AMERICA'S TELECOMMUNICATIONS INFRASTRUCTURE IS NOT ADVANCIN FAST ENOUGH TO MAINTAIN OUR NATION'S COMPETITIVE EDGE IN WORLD MARKETS, NOR TO BRING THE BENEFITS OF THE INFORMATION AGE TO AL OF OUR COUNTRY'S CITIZENS IN A TIMELY MANNER.

USTA'S FILING IN THE NTIA INQUIRY, AS WELL AS THOSE OF THE BELL OPERATING COMPANIES, INDEPENDENTS AND OTHERS DOCUMENT THIS FACT.

THERE ARE A NUMBER OF FUNDAMENTAL REASONS FOR CONCERN OVER INFRASTRUCTURE DEVELOPMENT. ONE IS THE AGGRESSIVE, NATIONAL AND MANY TIMES GOVERNMENT SUPPORTED EFFORTS IN TELECOMMUNICATIONS ADVANCEMENTS TAKING PLACE IN EUROPE AND ASIA. THE PACE OF THESE DEVELOPMENTS IS ACCELERATING MARKEDLY AS THESE GLOBAL COMPETITORS SEEK AN ADVANTAGEOUS POSITION IN AN EMERGING WORLD MARKET. BUT PERHAPS MORE ONEROUS IS THE FACT THAT THE PACE OF U.S. INFRASTRUCTURE DEVELOPMENT HAS BEEN IMPEDED IN RECENT YEARS BY WELL-INTENTIONED BUT ULTIMATELY COUNTERPRODUCTIVE CONSTRAINTS ON TELEPHONE COMPANIES IMPOSED BY CURRENT PUBLIC POLICIES.

THE RESULT HAS BEEN THAT AMERICA'S TELECOMMUNICATIONS

INFRASTRUCTURE IS NOT ADVANCING FAST ENOUGH TO MAINTAIN OUR NATION'S COMPETITIVE EDGE IN WORLD MARKETS, NOR TO BRING THE BENEFITS OF THE INFORMATION AGE TO ALL OF OUR COUNTRY'S CITIZENS IN A TIMELY MANNER.

U.S. INFRASTRUCTURE DEVELOPMENT HAS BEEN IMPEDED IN RECENT YEARS BY WELL-INTENTIONED, BUT ULTIMATELY COUNTERPRODUCTIVE CONSTRAINTS IMPOSED ON TELEPHONE COMPANIES BY CURRENT PUBLIC POLICIES.

EXAMPLES OF THESE CONSTRAINTS ARE THE 1984 CABLE ACT, THE FCC'S COMPUTER INQUIRIES, THE RIGIDITIES OF THE REGULATORY PROCESS AT BOTH THE STATE AND FEDERAL LEVEL, AND CONSTRAINTS IMPOSED BY THE MFJ.

THESE CONSTRAINTS, WHILE AIMED AT PROMOTING COMPETITION-- MISS THE MARK. THEY PROTECT COMPETITORS BY RESTRAINING IMPORTANT CONTRIBUTORS--TELEPHONE COMPANIES--FROM MARKET PARTICIPATION. WHAT'S MORE, THEY DENY TELEPHONE COMPANIES THE OPPORTUNITY TO PROVIDE THEIR CUSTOMERS WITH NEW SERVICES -- OPPORTUNITIES THAT WOULD PROVIDE INCENTIVES FOR THE MORE-RAPID DEPLOYMENT OF AN ADVANCED INFRASTRUCTURE.

IN RECENT YEARS, DUE TO CHANGES IN PUBLIC POLICIES, CRITICAL ACTIVITIES TO ENABLE INFRASTRUCTURE AND NEW SERVICE DEVELOPMENTS HAVE BEEN DISRUPTED. THESE FALL INTO THE AREAS OF INFRASTRUCTURE

SHARING, JOINT PLANNING AND STANDARDS-SETTING.

IF THE ADVANTAGES OF THE INFORMATION AGE ARE TO BE BROUGHT TO ALL AMERICANS, IT IS ESSENTIAL THAT TELEPHONE COMPANIES BE ALLOWED TO PROVIDE A WIDE RANGE OF SERVICES. THESE ADDITIONAL SERVICES CAN PERMIT THE PER UNIT COST OF EACH SERVICE TO BE REDUCED. FREED TO SHARE THE USE OF COSTLY NEW INFRASTRUCTURE. THIS IS PARTICULARLY IMPORTANT TO HELP OVERCOME THE DISADVANTAGES OF SCALE THAT OTHERWISE WILL ACCOMPANY THE PROVISION OF DATA BASES AND OTHER ADVANCED INFRASTRUCTURE ON THE SMALL SCALE OF OPERATIONS ENCOUNTERED IN RURAL AREAS.

THE COMPLEXITY ACCOMPANYING ADVANCED INFRASTRUCTURE DEPLOYMENT AND THE NEED TO COORDINATE FACILITIES AND SERVICES FOR INTER-OPERABILITY REQUIRE A CONTINUING PROCESS OF JOINT PLANNING AMONG ALL LOCAL EXCHANGE CARRIERS. AND, TO ASSURE INTER-OPERABILITY, IT IS ESSENTIAL THAT APPROPRIATE STANDARDS BE ESTABLISHED IN A TIMELY MANNER.

II. PUBLIC POLICY MUST PROMOTE INFRASTRUCTURE DEVELOPMENT AND THE SERVICES SUCH AN INFRASTRUCTURE WOULD PROVIDE.

IF CONSTRUCTION OF THE NATION'S BACKBONE EXCHANGE CARRIER TELECOMMUNICATIONS INFRASTRUCTURE IS TO PROGRESS AT A COMPETITIVE PACE, PUBLIC POLICIES MUST BE CHANGED TO NOT ONLY REMOVE ARBITRARY BARRIERS TELEPHONE COMPANIES NOW FACE BUT FURTHER TO

FOSTER CONDITIONS THAT PROMOTE THE DEPLOYMENT OF ADVANCED INFRASTRUCTURE AND NEW SERVICES. MFJ LEGISLATION SHOULD BE CONSIDERED IN THIS BROADER CONTEXT. INDEED, USTA'S POSITION ON MFJ LEGISLATION, AND SPECIFICALLY THE SAFEGUARDS CONTAINED THEREIN, ARE KEYED TO THESE BROADER INFRASTRUCTURE ISSUES REGARDING UBIQUITY, SEAMLESS INTER-OPERABILITY, EFFICIENCY AND TIMELY DEPLOYMENT.

III. USTA SUPPORTS MFJ RELIEF LEGISLATION WITH PROPER SAFEGUARDS

USTA SUPPORTS LEGISLATION THAT WOULD LIFT THE INFORMATION SERVICES AND MANUFACTURING RESTRICTIONS CURRENTLY CONTAINED IN THE MODIFIED FINAL JUDGMENT. OUR SUPPORT, HOWEVER, IS NOT UNCONDITIONAL AS WE BELIEVE SAFEGUARDS AND SPECIFIC CONDITIONS MUST BE INCLUDED IN ANY SUCH LEGISLATION. USTA IS ATTACHING TO THIS STATEMENT ITS RECOMMENDATIONS FOR MANUFACTURING SAFEGUARDS, WHICH I WILL DESCRIBE LATER IN THIS STATEMENT, THAT WE BELIEVE MUST BE ADDED TO S. 1981.

USTA'S POSITION ARISES FROM THE FOLLOWING PUBLIC POLICY OBJECTIVES:

> (1) UNIVERSAL SERVICE, (2) THE EXTENSION OF ADVANCED NETWORK CAPABILITY THROUGHOUT THE NATION, (3) THE NEED FOR CONTINUED "SEAMLESSNESS" IN THE NATIONWIDE NETWORK, (4) OUR INDUSTRY'S OWN COMMITMENT TO QUALITY SERVICE, AND (5) PUBLIC HEALTH, SAFETY, DEFENSE AND NATIONAL SECURITY CONCERNS.

USTA BELIEVES THAT ELIMINATING THE INFORMATION SERVICES AND

MANUFACTURING RESTRICTIONS FOR BELL OPERATING COMPANIES WILL HELP ALL LOCAL EXCHANGE COMPANIES ACHIEVE THESE OBJECTIVES AND MAINTAIN UNIVERSAL SERVICE.

USTA CONSISTENTLY HAS EMPHASIZED THE IMPORTANCE OF ENCOURAGING THE DEVELOPMENT OF ADVANCED TECHNOLOGIES THAT CAN BENEFIT LOCAL TELEPHONE CUSTOMERS, AND THE IMPORTANCE OF PROMOTING PROMPT AND UNHINDERED INTRODUCTION OF SUCH TECHNOLOGIES INTO LOCAL TELEPHONE NETWORKS. WE BELIEVE IT IS IMPORTANT FOR THOSE WHO DEPEND ON LOCAL TELEPHONE NETWORKS IN THEIR BUSINESSES AND HOME LIFE TO HAVE ACCESS TO NEW SERVICES AS THEY EMERGE. WE BELIEVE IT IS EQUALLY IMPORTANT THAT THE EVOLUTION OF THIS NATION'S LOCAL COMMUNICATIONS INFRASTRUCTURE NOT BE RETARDED BY BARRIERS SUCH AS THE MANUFACTURING AND INFORMATION SERVICES RESTRICTIONS OF THE MFJ.

III. a. INFORMATION SERVICES

THE INFORMATION SERVICES RESTRICTION BARRIER RETARDS GREATLY THE DEVELOPMENT OF A SMART, FEATURE RICH NATIONAL TELECOMMUNICATIONS INFRASTRUCTURE. LOCAL TELEPHONE NETWORKS ARE REQUIRED TO BE INTERCONNECTED BY LAW, AND THE OPTIMUM DEPLOYMENT OF COMMUNICATIONS SERVICES, PARTICULARLY THOSE THAT ARE NATIONAL IN SCOPE, DEMAND THAT ALL LOCAL TELEPHONE COMPANIES BE PERMITTED TO ENHANCE THEIR NETWORKS. THE INFORMATION SERVICES RESTRICTION THUS IS A SIGNIFICANT RETARDANT TO THIS OPTIMUM DEPLOYMENT AND

HINDERS "THE EXTENSION OF ADVANCED NETWORK CAPABILITY THROUGHOUT THE NATION" THAT USTA'S PROPOSED POLICY OBJECTIVE SEEKS TO FOSTER.

III b. MANUFACTURING

AS TO MANUFACTURING, BECAUSE THE OVERWHELMING MAJORITY OF OUR COMPANIES DO NOT MANUFACTURE ANY TELECOMMUNICATIONS EQUIPMENT, WE VIEW THIS RESTRICTION NOT FROM A COMPETITOR'S VIEWPOINT BUT AS CONSUMERS. AS CONSUMERS OF TELECOMMUNICATIONS PRODUCTS, WE BELIEVE THAT PERMITTING THE BELL OPERATING COMPANIES TO MANUFACTURE, SO LONG AS WE ARE GUARANTEED THE RIGHT TO BUY FROM THEM ON THE SAME TERMS AND CONDITIONS THAT THEY SELL TO THEMSELVES, WILL BE OF SIGNIFICANT VALUE TO US. THE BELL OPERATING COMPANIES HAVE FINANCIAL RESOURCES, TECHNICAL KNOWLEDGE, AND EXPERIENCE, ALL OF WHICH CAN BE BROUGHT TO BEAR IN THE DESIGN, DEVELOPMENT, AND MANUFACTURE OF TELECOMMUNICATIONS EQUIPMENT. THIS WOULD ONLY SERVE TO BENEFIT US. IT WOULD SUPPLY MORE COMPETITION TO THIS MARKET. WE FIND IT TOTALLY ANOMALOUS THAT VIRTUALLY ANY FOREIGN COMPANY, EVEN THOSE AFFILIATED WITH STATE-OWNED TELEPHONE MONOPOLIES, CAN MANUFACTURE AND THEN SELL TELECOMMUNICATIONS EQUIPMENT IN THIS COUNTRY, BUT SEVEN AMERICAN COMPANIES CANNOT. SAFEGUARDS CAN BE FASHIONED TO AVERT THE TYPE OF ANTITRUST PROBLEMS THAT WERE BROUGHT OUT IN THE GOVERNMENT'S CASE AGAINST AT&T. IN FACT, THE TELECOMMUNICATIONS EQUIPMENT MARKET WAS WELL ON ITS WAY TO BECOMING COMPETITIVE WHEN THIS CASE

WAS SETTLED.

THE BENEFITS OF LIFTING THE MANUFACTURING RESTRICTION COULD RESULT IN RESEARCH AND DEVELOPMENT MORE TARGETED TOWARD LOCAL TELEPHONE CUSTOMER NEEDS. SUCH BENEFITS WOULD INCLUDE IMPROVEMENTS IN OVERALL EFFICIENCY AND TECHNICAL QUALITY, AND A GENERALLY MORE "ROBUST" NETWORK. THE OPPORTUNITY FOR THE BELL OPERATING COMPANIES TO ENTER MANUFACTURING AND INFORMATION SERVICES MARKETS WOULD ITSELF PUSH OTHERS TO DEVELOP MORE PRODUCTS AND APPLICATIONS FASTER.

IV. SAFEGUARDS

AS I INDICATED EARLIER IN MY STATEMENT, USTA'S SUPPORT FOR THE LIFTING OF THESE TWO RESTRICTIONS IS NOT UNCONDITIONAL. IN ORDER TO ACHIEVE THE BENEFITS THAT I HAVE DESCRIBED, CERTAIN CONDITIONS OR SAFEGUARDS ARE NECESSARY. THE BOARD OF DIRECTORS OF USTA HAS DETERMINED THAT THE NEED FOR NETWORK PLANNING, COORDINATION, AND THE DEVELOPMENT OF STANDARDS FOR LOCAL TELEPHONE NETWORKS TO BENEFIT ALL LOCAL TELEPHONE SERVICE CUSTOMERS ARE PREREQUISITES FOR THE ASSOCIATION'S SUPPORT OF MFJ LEGISLATION.

IV. a NETWORK PLANNING

THE FIRST POLICY CONDITION THAT WE WOULD LIKE TO SEE ADDED TO ANY LEGISLATION IS A REQUIREMENT THAT ALL LOCAL EXCHANGE

CARRIERS ENGAGE IN NETWORK PLANNING FOR THE PROVISION OF INFORMATION SERVICES AND LOCAL TELEPHONE SERVICE. AS INDICATED EARLIER IN MY STATEMENT, LOCAL EXCHANGE CARRIERS ARE REQUIRED BY LAW TO BE INTERCONNECTED. IN ORDER TO DO THIS EFFICIENTLY SO THAT THESE LOCAL NETWORKS WILL BE INTER-OPERABLE AND SO THAT NEW TECHNOLOGIES AND SOFTWARE CAN BE INTRODUCED EFFECTIVELY, JOINT COORDINATED NETWORK PLANNING IS AN OPERATIONAL NECESSITY.

THIS MATTER OF NETWORK PLANNING IS AN EXTREMELY IMPORTANT ONE AND IS A MAJOR ISSUE THAT HAS BEEN OVERLOOKED BY POLICYMAKERS AT AL LEVELS SINCE DIVESTITURE. BEFORE DIVESTITURE, WE HAD CENTRAL AND COORDINATED PLANNING THROUGH AT&T WHICH SERVED AS THE NETWORK MANAGER. FOLLOWING DIVESTITURE, AT&T WAS NO LONGER IN THE LOCAL EXCHANGE BUSINESS NOR WAS THERE CREATED AN INSTITUTIONAL NETWORK PLANNING REPLACEMENT. BECAUSE OF THIS ABSENCE, IN THIS TIME OF TECHNOLOGICAL CHANGE, NETWORK PLANNING HAS NOT BEEN PERFORMED EFFECTIVELY.

USTA BELIEVES THAT THE FAILURE TO INCLUDE A NETWORK PLANNING PROVISION IS A MAJOR WEAKNESS OF THE STAFF DISCUSSION DRAFT BEING CURRENTLY DEBATED IN THE HOUSE AND WOULD HOPE THAT S. 1981 WOULD BE AMENDED TO INCLUDE WHAT USTA BELIEVES TO BE A MOST VITAL COMPONENT OF ANY MFJ LEGISLATION.

IV b. NETWORK STANDARDS

CLOSELY RELATED TO NETWORK PLANNING IS THE SETTING OF STANDARDS FOR LOCAL TELEPHONE EXCHANGE NETWORKS. ONCE AGAIN, PRE-DIVESTITURE AT&T WAS THE DE FACTO STANDARD SETTER VIA BELL LABS AND WESTERN ELECTRIC AND ONCE AGAIN, THIS VOID HAS NOT BEEN FILLED COMPLETELY. USTA BELIEVES THE FEDERAL COMMUNICATIONS COMMISSION SHOULD PROMULGATE REGULATIONS REQUIRING THAT STANDARDS BE ADOPTED BY APPROPRIATE STANDARD SETTING BODIES AND IMPLEMENTED BY LOCAL EXCHANGE CARRIERS. A PROVISION ON STANDARD SETTING SHOULD BE A PART OF ANY TELECOMMUNICATIONS LEGISLATION ENACTED.

MUCH LIKE NETWORK PLANNING, USTA BELIEVES THAT THE FAILURE TO INCLUDE A NETWORK STANDARD SETTING PROVISION IS A MAJOR WEAKNESS OF THE STAFF DISCUSSION DRAFT BEING CURRENTLY DEBATED IN THE HOUSE AND WOULD HOPE THAT S. 1981 WOULD BE AMENDED TO INCLUDE WHAT USTA BELIEVES TO BE A MOST VITAL COMPONENT OF ANY MFJ LEGISLATION.

IV c. RECIPROCAL SHARING OF INFRASTRUCTURE DEVELOPMENT

S. 1981 PERMITS BELL OPERATING COMPANIES TO MANUFACTURE TELECOMMUNICATIONS EQUIPMENT, AND APPEARS TO INCLUDE IN THE DEFINITION OF "TELECOMMUNICATIONS EQUIPMENT" SOFTWARE AS A CRITICAL COMPONENT OF SUCH EQUIPMENT.

WE APPLAUD THE RECOGNITION ON THE NEED TO INCLUDE SOFTWARE IN THE DETERMINATION OF WHAT CONSTITUTES EQUIPMENT, AND WOULD FURTHER RECOMMEND THAT ANY SUCH EQUIPMENT MANUFACTURED BY THE BELL OPERATING COMPANIES BE MADE AVAILABLE TO ALL OTHER LOCAL EXCHANGE COMPANIES AT COMPARABLE TERMS AND CONDITIONS. USTA BELIEVES SUCH A PROVISION IS A POSITIVE CONTRIBUTION TO THE GOAL OF ENSURING THAT CUSTOMERS EVEN IN RURAL AREAS WILL NOT BE LEFT OUT OF THE INFORMATION AGE BY FOSTERING THE BROAD AVAILABILITY OF EQUIPMENT NECESSARY FOR INFORMATION SERVICES.

WE FURTHER RECOMMEND THAT THIS PROVISION BE MADE RECIPROCAL. IF AN INDEPENDENT COMPANY MANUFACTURES, THEY TOO SHOULD BE REQUIRED TO MAKE AVAILABLE THEIR PRODUCTS TO THE BELL OPERATING COMPANIES AND OTHER INDEPENDENTS.

IV d. LOCAL FRANCHISE

MFJ RELIEF LEGISLATION SHOULD INCLUDE STRONG LANGUAGE TO CLARIFY THAT NEITHER THIS LEGISLATION, NOR THE 1934 COMMUNICATIONS ACT, AUTHORIZES THE FCC TO PREEMPT ANY STATE DETERMINED TELEPHONE FRANCHISE EXCHANGE AREA.

V. CONCLUSION

FINALLY, WE BELIEVE S. 1981 TO BE A POSITIVE DEVELOPMENT WHICH COULD BE FURTHER IMPROVED BY INCLUDING THE VARIOUS SAFEGUARDS OUTLINED ABOVE. WE WOULD WELCOME THE OPPORTUNITY TO WORK WITH THE SUBCOMMITTEE ON THE LEGISLATION

WRITTEN TESTIMONY OF CHANNEL AMERICA LPTV HOLDINGS, INC.

SUBMITTED FOR INCLUSION IN RECORD OF
MARCH 29, 1990 AND APRIL 4, 1990 HEARINGS ON

THE CABLE TV CONSUMER PROTECTION ACT OF 1990
S. 1880, AS REVISED BY MARCH 9, 1990 COMMITTEE DRAFT SUBSTITUTE

COMMUNICATIONS SUBCOMMITTEE OF
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
SENATOR DANIEL K. INOUYE, CHAIRMAN

Channel America LPTV Holdings, Inc. ("Channel America"), a leading publicly-traded company in the Low Power Television ("LPTV") industry, greatly appreciates this opportunity to provide written testimony for the record in this proceeding and wholeheartedly urges that the proposed Cable TV Consumer Protection Act of 1990[1] should be modified to afford must carry status for LPTV stations on local cable television systems.

I. Background

Channel America previously submitted testimony to the Subcommittee on November 15, 1990, which urged the adoption of legislation to provide must carry status for LPTV following the Subcommittee's October 25, 1989 hearings on cable carriage of local broadcast signals. At those hearings, Mr. John Kompas, President of the Community Broadcasters Association also vigorously testified in support of LPTV cable carriage and Senator Inouye specifically expressed concern about the importance of must carry status for

---

[1] S. 1880, as revised by Committee draft substitute of March 9, 1990.

LPTV stations. Despite this compelling testimony and the Senator's recognition of the significance of LPTV cable carriage at that time, LPTV is still inexplicably excluded from the must carry provisions of revised S. 1880.

Enactment of the proposed legislation in its present form would deny numerous communities access to new, innovative and local programming provided by LPTV entities like Channel America and would seriously threaten the continued ability of the LPTV industry to survive. Accordingly, Channel America hereby resubmits relevant portions of its earlier written testimony and respectfully urges that, in order to protect these important public interest objectives and values which Channel America will fully describe below, Congress should afford mandatory cable carriage rights to LPTV.

II. Channel America's Unique Perspective as Network, Licensee, and Program Originator

As explained in its earlier written testimony, Channel America operates a broadcast television network, owns and operates numerous LPTV stations, and produces original, innovative programming for airing on its network. As such, it represents a rapidly growing hybrid entity in the telecommunications industry, and has a unique perspective on the constitutional validity -- and practical imperative -- of including LPTV stations in the proposed cable consumer protection legislation (revised S.1880).

Channel America's programming network primarily serves the emerging LPTV industry, as well as cable television systems, full power broadcast stations, and the home satellite dish market. Its network operates 24 hours a day, seven days a week, and currently encompasses 33 operating stations that reach approximately eight million homes throughout the continental United States. The network began commercial broadcasting for its premiere season in October 1988. Through its network agreements, Channel America is the primary source of syndicated, originally produced programming to supplement the local program offerings of its numerous affiliated LPTV stations. In this important way, Channel America has encouraged and aided in the growth of the LPTV industry.

As an FCC licensee and permittee, Channel America is one of the largest owner/operators of major market LPTV stations in the United States. Since its inception in January 1987, Channel America has acquired, has acquired options to purchase, or has entered into contracts to manage 42 LPTV stations, 15 of which are already licensed.

Channel America is also a creator and distributor of original television programming for its network. It presently produces five original programs and distributes approximately 22 additional first-run shows per week for airing on the network. Channel America's original programming emphasizes viewer participation, and it is a leading innovator in the field of viewer participation programming.

In the near future, Channel America will be introducing new programming formats of great importance to the general public, Congress, and the FCC because of their value to the communities in Channel America's LPTV coverage areas. As illustrated in its prior testimony, these new formats exemplify how Channel America and LPTV together can provide unique and diverse broadcast services to the public that are not now available from other video and broadcast media.

Channel America's new "Club TV" format will allow highly-targeted viewers to participate in special interest clubs (e.g., travel, health, creativity) which go well beyond their television sets. Viewers will watch special interest programming, tailored to their local needs and interests. Such programming will instruct viewers on how to continue their special interest in their non-viewing lives, including interaction with others who share the same interest. The format emphasizes families, encouraging them to do things as a unit, but it also embraces single persons, providing the impetus for interaction with others with common interests. Also important, this participatory concept includes local small businesses, allowing them for the first time to really benefit from the television medium, which is usually reserved for major corporations with large advertising budgets.

A second new Channel America format is the "Small Business Network," which will provide existing and would-be local entrepreneurs with the first real forum to share ideas and to derive tangible benefits from same. Channel America will offer programming such as the "Small Business Workshop," which gives viewers insights into the workings and challenges of actual businesses, and "Dr. Biz," a call-in advice program, showcasing opportunities for part-time and family weekend businesses. Even more important, this new format will foster the creation of Small Business Cooperatives in each locale, where local merchants and service providers can exchange services, develop networking of prospective leads within a community or community-to-community, and participate in cooperative events and promotions within the community, using television as a key marketing vehicle. This format will mark the first time that television actually serves the small business community, the heart and soul of every locale. Allowing small entrepreneurs to begin to compete on more equal footing with big business is a key objective for the 1990's which Channel America vigorously will promote.

III. LPTV's First Amendment Carriage Rights

Channel America outlined in its prior testimony what it believes to be the essential flaws in previous First Amendment analyses of cable must carry rules, and clearly illustrated why LPTV stations (and other broadcast media) should be held to have their own First Amendment rights to cable carriage, which must be reconciled with the First Amendment rights of cable operators and programmers. Channel America provided this detailed analysis in response to Senator Inouye's earlier caveat at the October 25, 1989 hearings that any must carry legislation must pass "constitutional muster," referring to two decisions of the U.S. Court of Appeals for the District of Columbia Circuit which declared unconstitutional earlier FCC cable must carry rules -- Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986), and Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. 1987).

A. Court Decisions

To summarize, the Quincy and Century cases held that the FCC's 1972 and 1986 cable must carry rules violated the First Amendment rights of cable programmers, cable operators, and the viewing public. Cable programmers were said to be denied access to cable channels already occupied by mandatorily-carried local stations, cable operators were held to have lost their editorial discretion to fill their channels as they see fit, and cable subscribers were inhibited in their viewing selections. The Court further held that the FCC had failed to demonstrate that the must carry rules were necessary to protect local broadcasting (a possible justification, if proven) and that the 1972 rules were "fatally overbroad" because they indiscriminately protected all local broadcasters irrespective of the number of must carry stations in the locale, the degree of program duplication, the channel capacity of a cable system, and the potential exclusion of non-broadcast cable programmers.

The FCC's 1986 "interim" must carry rules attempted to come to grips with each of these objections, but were nevertheless invalidated in the Century case for failure to clearly foster a substantial governmental interest or to be brief enough in duration to qualify as only an incidental restriction on free speech. Because the FCC declined to make any further remedial efforts, all that now remains of these rules is Section 76.66 of the FCC's

Rules, concerning input selector ("A/B") switches and consumer education about them.

B. FCC's Section 307(b) Mandate and the First Amendment

Channel America believes that the Quincy and Century cases give inadequate consideration to the FCC's responsibilities under Section 307(b) of the Communications Act of 1934, as amended -- a Congressional mandate -- to "provide a fair, efficient, and equitable distribution of radio [and television] service" throughout the United States. In this connection, the Court mistakenly asserts in Quincy that the FCC has abjured all interest in the well-being of individual local broadcasters per se and is concerned only about local broadcasting or "localism" as an abstract concept. We respectfully submit that not only is this an inaccurate understanding of the FCC's public interest responsibilities, but that such a position, if held by the FCC, would clearly violate Section 307(b). Even though cable systems are not formally licensed by the FCC, they are still subject to the FCC's jurisdiction, United States v. Southwestern Cable Co., 392 U.S. 157 (1968), and, as such, the FCC has a primary responsibility to supervise the media interrelationships between cable and full-fledged broadcast licensees, including LPTV stations.

Channel America maintains that, paradoxically, the FCC's responsibilities vis-a-vis LPTV are actually enhanced by the fact that LPTV stations have "secondary" status in the broadcast universe. As secondary stations, LPTV outlets are not entitled to cause interference to full power television stations and, if they do, the LPTV station must eliminate the interference in some fashion or else cease broadcasting. Similarly, the average radius of an LPTV broadcast signal is between 15 and 25 miles, while the average radius of a full power station is between 50 and 75 miles. However, these strictures and engineering realities were knowingly crafted by the FCC when it fully elaborated the concept of LPTV stations and established the Low Power Television Service in Report and Order, FCC 82-107, 51 RR 2d 476 (1982). In so "giving birth" to LPTV as an inexpensive television outlet/programming challenge for broadcast entrepreneurs, the FCC did not intend to abandon its offspring. Rather, it carved out for LPTV a full-fledged albeit "secondary" role, and envisioned that LPTV would supplement and complement full power television, just as cable television does.

Channel America urges that if LPTV is to fulfill the role that the FCC originally envisioned for it as an innovator and local station par excellence, cable carriage is absolutely vital. By refusing to admit that cable subscribers may not obtain adequate off-cable reception through an A/B switch and that cable carriage may therefore be necessary to sustain a station's viability, the Century Court ignores 40 years of history proving that improved reception of local television stations is one of cable's two raisons d'etre. In other words, given LPTV stations' low power and small coverage areas, the FCC's Section 307(b) responsibilities and designated role for LPTV cannot be fulfilled without cable's assistance. This is the constitutional "substantial governmental interest" that warrants inclusion of LPTV in the FCC's cable must carry rules.

Put differently, in City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), the Supreme Court held that the awarding of exclusive cable franchises may violate the First Amendment rights of other cable operators to serve the same area. Similarly, the refusal of a cable system to carry a local LPTV station that needs such carriage in order to obtain local audience violates that LPTV station's First Amendment right to be viewed over cable and thwarts the FCC's licensing plan under Section 307(b) to use LPTV stations to supplement and complement other local telecommunications media.

IV. LPTV Under the FCC's Previous Must Carry Rules

With the LPTV Service having been officially established by the FCC in 1982, and given the FCC's above-described concerns about the role and progress of this new service, it is surprising to note that LPTV stations were not included as must carry stations in the 1986 FCC must carry rules. However, Paragraphs 93 and 144 and footnotes 75 and 97 of the Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864 (1986), make clear that the reason for LPTV's exclusion was simply that the FCC was implementing an "Industry Agreement" of several of the major broadcast and cable trade associations, and that Agreement provided that only "primary, full power television stations" qualified for must carry status. No analytical explanation for the exclusion of LPTV stations was provided, but the anti-competitive flavor of this "Agreement" is obvious.

V. Recommended LPTV Cable Must Carry Rules

The FCC's definitions of television translator stations and LPTV stations (47 C.F.R. §§74.701(a) and (f)) demonstrate that translator and LPTV stations are essentially identical in a regulatory sense, except that LPTV stations are permitted to originate as well as retransmit programming. This identity is significant because the FCC's 1972 cable rules specifically required carriage of all translator stations with 100 watts or higher power that were licensed to the community of the cable system. This important point must not be overlooked.

Indeed, to this day there are many LPTV stations that are still "officially" designated as translator stations in the FCC's records -- for example, Channel America's Station W68BI, Driver, Virginia, and Station W57AP, Falmouth, Maine. Since both of the "translator" stations in this illustration operate at 1000 watts, we would stoutly maintain that they are entitled to mandatory carriage on cable systems at Driver and Falmouth under the FCC's 1972 rules. Thus, Channel America urges that LPTV stations can and indeed should legitimately trace their cable must carry rights back to 1972, so that any carriage codification at this time should not be regarded as altogether "new".

Revised S.1880 would amend Part II of Title VI of the Communications Act of 1934, as amended ("the Communications Act"), to add Section 614 requiring the mandatory cable carriage of "qualified local broadcast stations." At the same time, the legislation proposes revisions to Section 602 of the Communications Act which would exempt LPTV from the definition of a "qualified local station" and improperly includes LPTV with television translator stations and "other passive repeaters" which do not originate programming. Channel America submits that LPTV stations, which do originate programming, should be entitled to inclusion as "qualified" stations under proposed Sections 614 and 602 of the draft legislation for mandatory cable carriage purposes.

In other words, having demonstrated above that LPTV stations are constitutionally entitled to cable must carry status under the First Amendment and philosophically entitled to such carriage under Section 307(b) of the Communications Act and the FCC's LPTV regulatory program, Channel America respectfully urges that the proposed Cable TV Consumer Protection Act of 1990 should be modified to include LPTV stations as "qualified" stations for must carry purposes.

IV. Conclusion

LPTV is an industry of entrepreneurs, which, like the domestic satellite industry, is in danger of being smothered by cable and broadcast industry giants. Channel America and the LPTV industry in general are committed to bringing new, innovative, and valuable viewer participation and other local programming to their audiences, which is clearly in the paramount public interest.

All that LPTV asks from Congress and the FCC is that LPTV stations be permitted to compete on equal terms with full power broadcast stations on cable television systems. In the final analysis, what should count is not whether a television station has "primary" or "secondary" status in an FCC technical sense, but rather whether its programming well serves its community of license. LPTV stations such as those licensed to Channel America clearly meet that test, and Channel America respectfully requests the Congress' assistance, via the above legislation modifications, in seeing that LPTV stations are treated fairly and equally with full power television stations.

Comments of the
Public Service Commission
# of the District of Columbia
on
"Amendment in the Nature of a Substitute for Cable Television Consumer Protection Act, S. 1880"

The Public Service Commission of the District of Columbia (D.C. PSC) hereby submits its comments on the "Amendment in the Nature of a Substitute for Cable Television Consumer Protection Act, S. 1880" (Draft Bill). The D.C. PSC is encouraged by Congress' recognition that the cable television re-regulation may be necessary in light of changes in market circumstances.1/ The D.C. PSC submits comments on two aspects of the Draft Bill: (1) the authority to regulate CATV, if such regulation is necessary; and (2) telephone company provision of video services on a common carrier basis.

The D.C. PSC requests that the Draft Bill's provision regarding "effective competition" should be modified.2/ Specifically, the D.C. PSC suggests that the Draft Bill should permit the states the flexibility to determine, based on the local factors presented within each jurisdiction, when "effective

---

1/ As the Draft Bill's "Findings" section indicates, among other items, since rate deregulation, the increase in average monthly rates for cable television (CATV) service has outpaced the Consumer Price Index by a factor of almost three, and the CATV industry has become "highly concentrated" and "vertically integrated." See Section 2, paras. (1), (5) and (6). The D.C. PSC submits that these findings, alone, require revisiting the issue of CATV regulation.

2/ See Sec. 5, proposed Section 623(c)(revision to 47 U.S.C. §543).

competition" exists. In general, the issue of competition within a given market is a function of the circumstances presented within that market. The states traditionally have had the experience in dealing with, and balancing, these concerns. Therefore, the D.C. PSC submits that the Draft Bill be modified to grant to the states the flexibility to accommodate the circumstances presented within their respective jurisdictions when determining when "effective competition" exists.

In addition, the D.C PSC suggests that the Draft Bill be revised to grant the states the authority to determine the standards for rate regulation when "effective competition" does not exist.[3] Again, this revision would recognize that the proper regulatory structure is dependent on the specific circumstances present in the geographic area, i.e., the presence or absence of market forces which determine the degree of regulatory oversight necessary. The FCC, as a federal agency, does not have the staff resources or the knowledge of the communities to assure that the local aspects of the particular CATV communities are accounted for. Therefore, an FCC-imposed rate regulation standard would not accommodate the variety of factors that may be present within various communities. Accordingly, the states should be given the flexibility to establish rate standards that balance the need of the CATV operators to earn a reasonable return on their investment and the CATV subscribers' interest in not bearing the burden of substantially higher rates for CATV service.4/

---

[3] See Section 5, proposed Section 623(b) (revision to 47 U.S.C. §543).

With regard to the Draft Bill's section which permits the provision of non-content based video services by telephone companies on a common carrier basis,5/ the D.C. PSC interprets this section to permit the states the authority to oversee the intrastate portion of that service, including the deployment of facilities required for such services. This interpretation is consistent with Section 152(b) of the Communications Act, as amended,6/ which reserves to the states the authority to regulate intrastate communications services. To assure that the Draft Bill is consistent with Section 152(b), the D.C. PSC requests that the Draft Bill be clarified to assure that no ambiguity is present.

Finally, the Commission is aware that on April 4, 1990, the Subcommittee held hearings on the issue of CATV/Telephone Company Cross ownership. Because this issue was raised, the D.C. PSC submits its view on this issue. Specifically, the D.C. PSC submits that the current restriction on cross-ownership7/ should be

---

4/ The D.C. PSC suggests that Congress may want to examine the general issue of CATV rate regulation to assure itself that CATV subscribers are obtaining all CATV services at affordable rates.

5/ See Sec. 10, proposed Section 621(b)(3)(amending 47 U.S.C. 541(b)).

6/ 47 U.S.C. §152(b).

7/ See 47 U.S.C. §533.

retained in order to protect telephone ratepayers from cross-subsidies. If the restriction were lifted, telephone companies could have incentives to enter the CATV industry while simultaneously shifting the cost of entrance to the telephone ratepayers. Therefore, the D.C. PSC submits that, to avoid this possibility, the current restriction should be retained.

STATEMENT OF MICHAEL ROBERTS, ROBERTS BROADCASTING COMPANY

Mr. Chairman and Members of the Subcommittee:

Roberts Broadcasting Company is the licensee of WHSL-TV, Channel 46, in St. Louis. Roberts conditionally supports the must carry provisions of legislation pending before this Subcommittee to require cable systems to carry all local full power television stations operating within 50 miles of their principal headend. Roberts believes, however, that the must carry provisions can better attain the goal of promoting an informed electorate and be more likely to be upheld in court if amended to require mandatory carriage of all full power stations within 35 miles of the headend before the cable system can use discretion to fill the channels set aside for broadcast with other full power stations between 36 and 50 miles from the headend. We believe that this 35 within 50 mile approach will guarantee the public's continued access to locally produced issue oriented and non-entertainment programming required of television broadcasters by Section 307(b) of the Communications Act.

Must carry is vital to the survival of local television stations because, as FCC Chairman Sikes said at the FCC's March 2, 1989 cable TV field hearing in Orlando, Florida, cable has become the "principal reception medium" for television. And, as the Chairman noted at the March 15 field hearing in St. Louis, once a household subscribes to cable, it no longer maintains the ability to receive TV programming over-the-air. All of this means that unless a station has access to cable in its service area, it cannot reach all households within the viewing area and, therefore, fairly compete with cable-delivered programming and carried TV stations.

For the holder of a newly issued television construction permit, cable carriage or the lack of cable carriage, may well determine whether or not the station is built, and if built, whether it can survive. Must carry is particularly important for local TV stations owned by minorities and construction permits held by minorities. Because of long standing Congressionally endorsed and defended FCC initiatives, the number of minority owned television stations has increased from 17 prior to the 1984 Cable Act to 46 today. In addition, 21 or 10% of the 215 outstanding television construction permits are minority owned. During the same period, cable's national penetration rate has risen from 42% to its dominant position today, 57%. The FCC's minority ownership policies, which are now under attack in the Supreme Court, have resulted in a significant increase in the ownership of local TV stations by minorities. However, if the progress is to continue, if existing minority owned stations are to have a chance to remain in operation and if the minority owners of construction permits are to be successful in securing construction financing to build their stations and eventually serve the TV homes in their markets, must carry must be adopted. Indeed, enactment of must carry may soon be the only means available to continue to promote increasing the ownership of local TV stations by minority licensees.

The role of cable carriage in the construction of WHSL might be helpful in your consideration of most carry legislation. Roberts Broadcasting Company applied to the FCC for a construction permit to build Channel 46 in 1981. Other applicants also filed and after six years and an expensive comparative hearing, we were finally awarded the permit in 1987. After receiving the CP, however, we began the more difficult process of securing construction financing. We found that banks were interested in three primary considerations: (1) the capability of station management; (2) the station's proposed programming; and (3) local cable penetration and guarantees that the station would be carried by local cable operators. Each time, our business plan demonstrated strong abilities in management and programming. But cable carriage was so unpredictable that bank after bank refused to extend us financing. This would be a very frustrating experience for anyone, but even more difficult for minorities seeking to enter broadcasting for the first time. The rules of the game changed between 1981 (when we applied and all local stations were required to be carried on their cable systems) and 1987 (when cable had become the dominant TV distribution medium and must carry was no longer required).

In the face of this financing/cable dilemma, we were fortunate to meet Home Shopping Network, Inc. HSN recognized the potential of the St. Louis market and supported its confidence in our abilities by providing a long term network affiliation agreement and construction financing. WHSL signed on the air last September, the first new St. Louis commercial TV station in 20 years. WHSL has created new jobs and new opportunities for the minority community in St. Louis. It provides the 2.5 million viewers in our service area with nearly three hours of issue oriented non-entertainment programming, childrens programming and public service announcements each day plus an additional four hours on Sunday. This is more public affairs programming than any other commercial station in the market. Yet in spite of this success, WHSL has yet to break down the barriers created by cable operators in our area even though we have the strongest signal in the market. Of the 1,056,400 TV households within a 35 mile radius of St. Louis, 359,196 are cable households. However, WHSL is not available to 265,506 or 74% of the cable households. And the problem will only intensify as cable penetration in the market continues to climb. If you are not on cable you are not on a level playing, indeed, you are not even on the same playing field as your competitors. For a high number UHF station such as WHSL, channel placement is irrelevant, we need access.

Our situation is not unique. Blackstar Communications, Inc., another minority owned corporation, is the licensee of three UHF TV stations. Blackstar's Melbourne, Florida station, WBSF, serves an estimated 820,000 households, 520,000 of which subscribe to cable. Cable penetration in the Orlando market is approaching 70%, which means that if WBSF is not carried on cable, it effectively is not going to be seen. WBSF is carried on 32 Orlando area cable systems with about 403,000 subscribers. WBSF is still denied coverage to 117,000 or 23% of the cabled households in the market. These households are denied access to WBSF's 21 hours weekly of locally produced nonentertainment and issue oriented programming.

Blackstar's Ann Arbor, Michigan station, WBSX, is available to only 22% of the cable households in its service area. Yet, while WBSX is the only full power commercial television allocation for Ann Arbor and Washtenaw County, Michigan, the cable systems in the market, including those in Ann Arbor, Ypsilanti, Saline, Milan, Chelsea and Dexter, do not carry WBSX, depriving their subscribers of the station's locally produced nonentertainment and issue oriented public affairs programming.

Blackstar's Salem, Oregon station, KBSP, serves a market of 740,680 TV households. Just over 390,000 homes subscribe to cable, but KBSP is carried on systems reaching only 142,147 or 36% of cable households in the market; 247,853 or 64% of the households are denied access to KBSP and the station's 20 plus hours weekly of locally produced nonentertainment and issue oriented programming.

In February of this year, HSN completed a study[1/] of 36 of the 46 minority owned TV stations on the air today. The study disclosed that these stations have a total household coverage within a 35 mile radius of 25,213,820. Cable penetration within that radius is 54% or 13,500,465 homes. Yet nearly 4,000,000 cable subscribers are denied access to these stations and the locally produced programming they are required by Section 307(b) of the Communications Act to produce and air.

The importance of a 35 mile must carry law is reflected in the attached resolution adopted on March 2, 1990 by the National Black Caucus of Local Elected Officials of the National League of Cities. It urges adoption of a 35 mile must carry law in order to assure citizens with access to locally produced programming required of stations under Section 307(b) of the Communications Act of 1934, as amended, and in

---

1/ The HSN analysis utilized AC Nielsen's Data Base.

order to promote an increase in the number of local television stations owned and operated by minorities".

Must carry problems are not limited, however, to minority owned stations. HSN owns television stations in the following markets: New York, Los Angeles, Chicago, Philadelphia, Boston, Dallas, Houston, Cleveland, Tampa, Miami, and Baltimore. The 11 markets comprise of 29,274,980 TV households within a 35 mile radius of each market. Cable penetration within the 11 markets is 13,055,525 or 44%. However, 5,781,266 or 44% of those cable households are denied access to 21 hours weekly of locally produced nonentertainment and issue oriented programming aired by the HSN stations. The table below provides a detailed analysis of the HSN stations' public affairs programming from December 1986 through December 1989:

MARKETS	NUMBER OF ISSUES	TOTAL NUMBER OF GUESTS	GUESTS WHO ARE GOVT. OFFICIALS
Newark, NJ	1608	375	105
Smithtown, NY	512	313	52
Boston, MA	459	1208	161
Baltimore, MD	786	652	296
Vineland, NJ	460	1207	259
Cleveland, OH	702	629	172
Aurora, IL	469	821	25
Miami, FL	496	200	28
Tampa, FL	724	521	25
Houston, TX	1093	446	58
Dallas, TX	485	619	5
Ontario, CA	750	638	215
TOTAL	8544	7629	1401 (18% of Total)

These segments represent over 2000 hours, totalling 85 broadcast days, of issue oriented programming.

For all local TV stations, must carry is essential if they are to compete on the same playing field as cable delivered programming, whether it's a cable network or another local TV station. But as I have said, the problem is particularly acute for local TV stations that happen to be owned by minorities. While federal policy has increased the number of minority owned TV stations, a minority owned station often is the last in market and with a high UHF channel. This was not an insurmountable problem as long as there was must carry enabling all to compete equally on the basis of programming and not on the basis of access to homes. But in an era in which cable is the dominant video distribution medium, and carriage is totally at the whim of the cable operator, a new station does not have a fair opportunity to compete for audience if it is not carried by cable.

It is for these reasons, therefore, that Roberts supports adoption of a law requiring cable companies to first carry all local full power television stations within 35 miles of their principal headends before they can choose other stations 36 to 50 miles out. We believe that such a must carry law premised on TV stations' Section 307(b) local programming responsibilities and perhaps tied in part to the percentage of local nonentertainment and issue oriented programming aired by TV stations, provides a sound legal foundation that would pass judicial muster.

The table that follows demonstrates that a 35 within 50 mile must carry law will facilitate local stations' compliance with their Section 307(b) obligations. Using a 35 mile radius from a transmitter site and on the basis of a 38 channel cable system which is required to carry 13 local channels under the Danforth Bill, S.1880, and the

March 9, 1990 Committee Staff Draft, all local full power TV stations would be carried on cable except in the Los Angeles and San Francisco markets.

MUST CARRY TOP 25 MARKETS

Based on 13 Channels of a 38 Channel System

RANK	MARKET	NUMBER OF STATIONS	CARRIAGE LIKELIHOOD
1	New York, NY	12	Yes - all stations
2	Los Angeles, CA	19	No
3	Chicago, IL	13	Yes - all stations
4	Philadelphia, PA	8	Yes - all stations
5	San Francisco, CA	18	No
6	Boston, MA	12	Yes - all stations
7	Detroit, MA	8	Yes - all stations
8	Dallas/FT. Worth, TX	13	Yes - all stations
9	Washington, D.C.	9	Yes - all stations
10	Houston, TX	12	Yes - all stations
11	Cleveland, OH	11	Yes - all stations
12	Atlanta, GA	9	Yes - all stations
13	Minneapolis, MN	8	Yes - all stations
14	Tampa/St. Pete, FL	11	Yes - all stations
15	Seattle, WA	10	Yes - all stations
16	Miami, FL	12	Yes - all stations
17	Pittsburgh, PA	8	Yes - all stations
18	St. Louis, MO	7	Yes - all stations
19	Denver, CO	8	Yes - all stations
20	Sacramento/Stockton, CA	9	Yes - all stations
21	Phoenix, AZ	9	Yes - all stations
22	Baltimore, MD	7	Yes - all stations
23	Hartford/New Haven, CT	9	Yes - all stations
24	Indianapolis, IN	8	Yes - all stations
25	San Diego, CA	8	Yes - all stations

Even in Los Angeles and San Francisco, local station carriage would be substantial because these two markets each have basically two major transmitter sites that are approximately 20 miles apart. The Los Angeles sites are Mt. Wilson and Sunset Ridge, the San Francisco sites are Mt. Sutro and Mt. Bruno. Additionally, from the 17th largest market on through the entire U.S. TV market place, a cable system would have to have only 30 channels (10 for local stations) to carry all local full power TV stations.

As I stated previously, Roberts urges that the provisions of the Danforth bill and the Committee Staff Draft establishing a 50 mile must carry radius should be modified to provide for mandatory carriage by a cable system of all signals within 35 miles and discretionary carriage of those stations located from 36 to 50 miles from the system to meet its quota of channels set aside for TV stations. The use of a 35 mile standard to define a station's "local", service area is consistent with FCC and Congressional actions. Section 73.658(m) of the FCC's Rules, governing territorial exclusivity for non-network programming, provides a 35 mile standard for defining the area in which a television station may negotiate for exclusive distribution of such programming. In 1976, when Congress enacted the compulsory licensing scheme to permit cable television systems to retransmit broadcast signals without negotiating individual copyright payments, it adopted a 35 mile standard for defining local signals.[2]

Section 307(b) broadcast localism, as well as is a cornerstone of the U.S. television system and is a primary legal basis for a must-carry rule. The Supreme Court has recognized localism as a substantial government interest,[3] as did the Court of Appeals in Quincy.[4] The point of departure in Quincy was that the FCC did not, at that time, demonstrate that the Section 307(b) policies would be at risk absent a must-carry rule.[5] Roberts believes that maintaining the integrity of the FCC's television spectrum allocation scheme and licensees' longstanding statutory obligation to provide local programming and thus promote localism as well as the All-Channel television legislation, justify a must-carry rule.[6]

---

[2] In the 1972 Cable and Television Report and Order, the FCC classified as local, signals of television stations with 35 miles of a cable system. 36 F.C.C.2d 1, 33 (1972). This was the standard utilized by the United States Copyright Office.

---

[3] The Supreme Court has stated:

> There can be little doubt that the comprehensive regulations developed over the past twenty years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest. In crafting this regulatory scheme, the Commission has attempted to strike a balance between protecting non-cable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers. See e.g., Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d, at 744-746. To accomplish this regulatory goal, the Commission has deemed it necessary to assert exclusive jurisdiction over signal carriage by cable systems.

Capital Cities Cable Inc., v. Crisp, 104 S. Ct. 2694, 2708 (1984). See also National Association of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

[4] Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 n.43 (D.C. Cir. 1985).

[5] Writing for the court Judge J. Skelly Wright stated:

> We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment. As long as it continues to rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered

(continued...)

The FCC has consistently emphasized a licensee's local nonentertainment programming obligation in its radio and television deregulation orders. Radio Deregulation, 84 F.C.C.2d 968, 977 (1981); Television Deregulation, 98 F.C.C.2d 1076, 1091-92 (1984), reconsideration denied, 104 F.C.C.2d 357 (1986). The FCC regards this obligation as arising from Section 307(b). Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 207 (D.C. Cir. 1956), cert denied, 76 S. Ct. 650 (1956). The court of appeals has noted that the public interest standard imposes statutory nonentertainment programming obligations on licensees. UCC v. FCC, 707 F.2d 1413, 1429, n. 46 (D.C. Cir. 1983).

5/ (...continued)

> by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done. (emphasis supplied)

Id. at 1459.

6/ See, e.g., Letter from Honorable John C. Danforth, Chairman, Committee on Commerce, Science and Transportation, to Chairman Mark S. Fowler on July 22, 1986, at page 4:

> If the Commission acquiesces to circumstances that bestow gatekeeper status upon cable systems, this will conflict with three longstanding, substantial government interests -- the public's First Amendment right to access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

Because broadcasters are obligated by statute to serve their local communities, it is incumbent upon the Congress to ensure those signals are, in fact, accessible.[7] Only the reimposition of a 35 within 50 mile must carry law will ensure such access for local television broadcasters and, in the process, allow full compliance with Section 307(b) of the Communications Act.

Roberts Broadcasting Company hopes you will give local broadcasters the opportunity to effectively compete in the video services marketplace by adopting a 35 within 50 mile must carry law.

Thank you.

7/ The FCC's current regulations requiring a licensee to place a city grade signal over its community of license become somewhat superfluous if a significant percentage of the population subscribes to cable and is unable to receive the licensee's signal. See 47 C.F.R. § 73.685(a).

Southwest Missouri Cable TV, Inc.
P O BOX 696 / CARTHAGE MISSOURI 64836

March 17, 1990

Honorable Ernest F. Hollings
SR-125
Russell Senate Office Building
Washington, DC 20510-4002

Dear Senator Hollings:

In regard to the recently released Senate Commerce Committee "Staff Draft" our firm is greatly distressed that the draft, if enacted, would virtually tie the hands of the cable industry from making investments in the future as well as seriously affect cable systems that have recently invested considerable money in their plant. In 1989 we completely rebuilt our headend in Carthage to 35 channel capacity and are presently making plans to go fiber and rebuild our plant. Also, last year we added an additional channel to our other three headends in Monett, Aurora, and Lamar and are planning to add more channels this fall to these plants. We are concerned that our investment already made in rebuilding and adding channels will cause considerable problems for us in meeting our debt payments. Presently we are building a great number of rural extensions to our present plants and are now worried that we may not be safe financially to finish these rural projects or add channels this fall as we had planned. Our company has been in the cable business for 25 years and has an excellent record of serving our communities. We have only had four rate raises in 25 years, and our franchises with the cities for the most part are not regulated. We have always respected their high regard of our company and we personally meet with our cities when we do need a rate raise and have never been denied a rate raise. We also inform our subscribers 30 days or more of any impending rate raise. The "Staff Draft" as I understand it would make it mandatory for our cities to impose rate regulation even though Carthage deregulated our regulated franchise years ago.

The "Staff Draft" represents a sweeping roll back of the Cable Act of 1984 and the proposed change in the Act's renewal protections would certainly provide no incentive to invest in programming and plant. It is evident that the cable industry programming would suffer and less quality programming would be created.

We feel that the "draft" denies cable networks the right to determine who to sell programming to which is nationalistic and socialistic in stripping away from the networks and cable affiliates the intellectual property rights other competitive industry such as newspapers and broadcasters enjoy.

It is our fear that if the must carry provisions of the "staff draft" are implemented they would create expensive costs to cable operators and add to their overhead which would create more problems in rate raises. Many operators would be forced to drop cable networks they carry and add more broadcast stations and program contracts would be breached. The draft goes beyond what was agreed between the broadcasters and the cable industry in 1987. The Senate Commerce Committee was told last fall by the NCTA that the cable industry stands ready to incorporate the must carry rules as agreed to with broadcasters.

We feel the "video dial tone" provision of the "Staff Draft" in combination with the "program access" provisions, are extremely unfair to cable operators. If enacted, these provision would allow telco channel lessees to obtain cable programming at the same price as cable systems, use capacity from a telephone company to deliver the programming, and yet face none of the franchising requirements a cable operator must meet. Since there is much talk about competition, real competition starts with offering a different program product. It is redundant to offer two sources of distribution (cable and telephone) with the same programming on each distribution system. The consumer deserves a varied menu of programming and each multi channel industry should create its own identity in programming.

Competition evolves as nature planned it, in a normal way. However sometimes man made laws which force issues upset this normal cycle and creates chaos. We have a considerable stake in the future supported by our past twenty-five years of dedication and hard work in the cable industry. We pray the Senate Commerce Committee will not consider the present form of the "Staff Draft". It would certainly crush incentives for local operators to invest in new programming and stop the improvement to their plant and equipment. This would result in less choice, quality and value for cable customers.

The Cable Act deregulating rates has only had since 1987 or two years to provide any test. That is not long enough to provide a real test - five years of rate deregulation would provide a much better picture.

Thank you for your time in reading this letter. We would appreciate your utmost consideration in reviewing the facts presented.

Respectfully submitted,

Ruth I. Kolpin
President

A&E
ARTS & ENTERTAINMENT Cable Network

NICKOLAS DAVATZES
President & CEO

March 20, 1990

The Honorable Ernest F. Hollings
Chairman
Senate Commerce Committee
U.S. Senate
Washington, DC 20510

Dear Senator Hollings:

I am the President of the Arts & Entertainment Network. A&E is an independent programmer that is not affiliated with any cable operator. We provide quality programming ranging from the arts, drama, documentaries, and comedy to 5,000 cable systems, and thus to 44,628,000 homes.

I am writing to express my opposition to the recently circulated "Staff Draft" of a bill that would subject the cable industry to renewed regulation. The "Staff Draft" deeply concerns me. At the very time that cable programming is beginning to flourish the Senate staff is proposing legislation that would insure the demise of some basic cable programming services.

The deregulation of cable in 1984 led to a dramatic infusion of investment in new and existing programming services. The investment of cable companies in basic cable programming has increased threefold since 1984, from $381 million to $998 million. As a result, the number of national, satellite-delivered programming services grew significantly since 1984.

Arts & Entertainment, like other basic cable networks, was given the opportunity to survive economically and meet its mission of quality programming because of the deregulation of the industry. At the very heart of our business has been the significant investment in programming over the years. Since deregulation, for example A&E has been able to increase programming investment by 317%. These investments have led to acclaim for our quality programming. Prior to deregulation only three basic services were profitable. This was primarily due to the significant tiering levels which existed at that time, which denied distribution to the widest potential audience, insuring economic failure to emerging basic services. With deregulation came detiering of services and the simplification of the cable offering, thereby increasing the number of networks available to the consumer.

555 FIFTH AVENUE NEW YORK, NY 10017 (212) 210-0501
HEARST/ABC/NBC

All of this would be threatened by rate regulation. I believe that reregulation could cause the demise of at least 10 to 15 programming services. Reregulation would also force programming services like A&E to seek wider audience appeal. This would undercut cable's primary benefit, "narrowcasting." Thanks to cable deregulation, channels aimed at narrow audiences have filled specific niches, with great success. Services such as Black Entertainment Television, The Discovery Channel, Financial News Network, The Weather Channel, The Learning Channel and Arts & Entertainment would suffer devastating consequences that would threaten their existence.

The Section of the bill that undercuts franchise renewals is also a problem. Independent programmers and cable operators alike benefit from the certainty built into the franchise renewal process by the Cable Communications Policy Act of 1984. If the franchise renewal process becomes unsettled, programming services will suffer along with cable operators.

Cable is an industry that has experiences remarkable growth over the last ten years, from 21 million subscribers in 1980 to over 55 million today. In the midst of this expansion, Congress passed the 1984 Act, which had its intended effect in accelerating the pace of change in the industry. The fact that this transition has not been a perfectly smooth one does not mean that Congress made a mistake in deregulation the industry, or that Congress should act now to reregulate it. Instead, for the good of the industry and for the good of independent programmers like A&E, please give cable some time to adjust, and to implement a responsible program of self-regulation (such as the new customer service guidelines recently developed by the National Cable Television Association).

This is not the time to put the brakes on an industry through regulation. For it is this very industry which has created thousands of jobs, provided thousands of hours of programs that have educational merit and through its programs provided voices that would not have been heard and seen in America.

It should also be noted that basic cable networks like Arts & Entertainment could not have survived without the active support of the cable operators through the payment of subscribers' fees. Commercials alone cannot insure the viability of basic program services. The proposed legislation which dictates to whom we must sell and under what conditions is clearly less than the free enterprise system that America stands for.

I urge you to oppose reregulation and challenge the industry to self-regulate. If I can be of any assistance, please feel free to call on me.

Sincerely,

Nickolas Davatzes

fm
encl.

P.S. I've taken the liberty to enclose material which describes our programming, corporate philosophy and press coverage about A&E activities.

NATIONAL
CABLE TELEVISION
COOPERATIVE, INC.

March 27, 1990

Ref.: Cable Television Re-Regulation Public Hearings
Scheduled for March 29th and April 4, 1990

The Honorable Ernest F. Hollings
U.S. Senator from South Carolina
Washington, D.C. 20510-4002

Dear Senator Hollings:

As you prepare for next week's Commerce subcommittee public hearings on cable TV, I'd like to remind you that all is not well for the cable subscribers of small-town America. There are two critical cable TV issues we'd like you to consider.

First, the issue of volume discounting of cable television programming at the wholesale level.

The National Cable Television Cooperative represents over 200 franchised cable companies spread across 40+ states. Our members provide cable service to more than 2,000,000 basic subscribers in nearly 1,400 cable systems. Those subscribers -- your constituents -- need your help at this critical time.

The NCTC was founded in 1984 to try to "level the playing field" by reducing or eliminating the practice of deep volume discounting by cable program networks at the wholesale level. You may not be aware that most big-city cable systems are owned by huge multiple-system operators (MSOs), while most small-town systems are owned by independent operators who pay "list price" for most of the programming they buy for their subscribers.

We've been able to convince many small, less universally-distributed networks to deal with us on behalf of our members. But many of the largest networks -- such as HBO, Cinemax, ESPN, CNN, USA -- refuse to deal with the Cooperative.

Instead, they continue to pass on their most favorable rates to the largest MSOs, while smaller operators (and their subscribers) pay a disproportionate share of their revenues for the same programming. As a result, most small-town subscribers are left to pay artificially-high retail rates.

On behalf of your constituents who subscribe to NCTC-member systems, we'd like your support in ensuring that small-town cable subscribers get a fair shake. We need your help to see that any new cable regulations enacted require cable programmers to deal with us on behalf of our members.

[illegible] [illegible]
[illegible] [illegible]

Second, the issue of regulating retail rates while increases in wholesale prices are left unchecked.

Shoddy cable service (where it exists) is ours alone to cure. But before regulators rush to condemn local cable operators for high retail prices, they ought to know of the rising tide of wholesale pricing pressures he faces.

Here are just a handful of examples of exploding wholesale prices which must be passed on to the cable subscriber:

o ESPN started out as a service which would pay cable operators to carry it. With the NFL surcharge, ESPN now charges cable operators nearly $.45 per subscriber per month. At this rate, ESPN seems destined to be the first $1/sub basic service.

o USA Cable Network -- which also started free to the operator, is now $.23 sub/month wholesale. Wholesale rates for USA rose 77% in 366 days, from 12/31/88 to 1/1/90!

o TNT, launched without charge in October of 1988, was $.15 sub/month last year. It's now $.20 sub/month, will be $.25 on 1/1/91, and will rise to at least $.37 sub/month in another year when the mandatory NFL surcharge is tacked on.

o HBO just raised their wholesale ceiling price (which most small operators pay) from $5.50 to $5.70. Ever wonder why your HBO bill is so high?

Cable system owners want to keep retail rates low. All things being equal, we gain and keep more subscribers at lower retail rates. But unless we're printing $20 bills in the back room (which we aren't), we must pass along wholesale rate increases to our subscribers.

If Congress wants to separate the muggers from the muggees, look to New York and Los Angeles (where the cable networks have their headquarters). We're as powerless as our subscribers to control rising prices!

I'll enclose a copy of our member roster to show you the scope of our organization and the breadth of our responsibility. I hope you'll remember the Cooperative, our members and their subscribers as you work to develop new cable regulations.

Thank you for your attention to my request.

Very respectfully,

Michael L Pandzik

Michael L. Pandzik
President

Encl: NCTC member roster.

March 28, 1990

The Honorable Fritz Hollings
Chairman, Senate Committee on Commerce, Science and
Transportation
125 Russell Building

The Honorable John Danforth
Ranking Minority Member, Senate Committee on Commerce, Science
and Transportation
249 Russell Building

The Honorable Daniel Inouye
Chairman, Senate Communications Subcommittee
722 Hart Building

Dear Senator Hollings, Danforth, and Inouye:

The Consumer Federation of America (CFA) 1, Consumers Union 2, and Public Citizen 3 (hereinafter "Consumers") strongly support the March 9, 1990 Committee Staff Draft, "Amendment in the Nature of a Substitute for the Cable Television Consumer Protection Act, S.1880." Since this Staff Draft would preserve

---

1 CFA is a coalition of over 240 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

2 Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, with a circulation of approximately 3 million, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions.

3 Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971, which works on behalf of its 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

and enhance the key consumer protections in S.1880, Consumers urge you to begin Committee consideration of this legislative proposal as soon as possible.

The Staff Draft addresses the three most important problems in the cable market that deny consumers maximum high quality video services at the most reasonable price: vertical integration, horizontal concentration and monopolistic pricing. By providing an improved trigger for basic rate deregulation (i.e. deregulating basic rates only when there is a comparable multichannel alternative to a local cable system) and expanding regulatory authority to prevent discrimination by cable operators against programming or service competitors (i.e. fair pricing for leased channels along with potential limits on cable control over a broad base of subscribers or future competitors) the Staff Draft would empower and direct the Federal Communications Commission (FCC) to drive basic rates down and promote competition.

Consumers believe that monopolistic conditions in the cable market make it essential to move this legislation expeditiously. As we have demonstrated in earlier hearings before the Committee, the cable industry has been earning monopoly profits at the expense of the American consumer by thwarting competition and overpricing basic service.[4] Even the cable industry's most extensive critique of consumer data does not effectively challenge the core evidence concerning monopolistic practices (see Attachment). Consumers believe that legislation like the Staff Draft could put an end to the cable industry's monopolistic practices, saving consumers billions of dollars each year.

---

[4] See Statement of Gene Kimmelman, CFA, Before the Senate Communications Subcommittee, June 21, 1989 and November 16, 1989.

Although we have a number of concerns about details of the Staff Draft and believe it is premature and dangerous to consider telephone company entry into the video business at this time, Consumers endorse this legislative proposal and hope the Committee will perfect it and report legislation to the full Senate very soon.

Sincerely,

Gene Kimmelman
Legislative Director
Consumer Federation of America

Linda Lipsen
Linda Lipsen
Legislative Counsel
Consumers Union

Pamela Gilbert
Pamela Gilbert
Legislative Director
Public Citizen's Congress Watch

cc: Members of the Committee on Commerce, Science and Transportation

Attachment

TOBIN'S Q AS AN INDICATOR OF MONOPOLY POWER IN THE CABLE INDUSTRY

The paper commissioned by the National Cable Television Association (NCTA) to criticize estimates of the cost of unregulated market power in the cable industry based on Tobin's q presents a purely theoretical critique of Tobin's q that completely misstates the issue, misrepresents the empirical evidence and does not counter market data demonstrating cable's monopoly power.[1]

The Consumer Federation of America (CFA) has pointed out that a mountain of evidence, reinforced by the recent dramatic increase in the ratio of cable sales price to cost of service (i.e., Tobin's q ratio) demonstrates that basic cable rate increases since deregulation reflect the monopoly power of the cable industry (see Table 1).

The NCTA paper asserts and implies that Tobin's q was presented as proof of monopoly power. Quite the contrary is the case in CFA's analysis.[2] A high Tobin's q may be a necessary condition to infer monopoly power, but we recognize that it is not a sufficient condition.

CFA presented a wide variety of evidence demonstrating market power, including direct estimates of market structure, evidence of anti-competitive behavior, etc. to demonstrate the existence of market power. We presented evidence on

horizontal concentration,

vertical integration,

joint venture interconnection,

absence of competing technologies,

efforts to impose anti-competitive arrangements,

statistical evidence of market foreclosure,

---

[1] Grossman, Sanford J., "On the Misuse of Tobin's Q to Measure Monopoly Power," in Comments of the National Cable Television Association, Inc. (Federal Communications Commission, MM Docket No. 89-600, March 1, 1990).

[2] Kimmelman, Gene and Mark N. Cooper, "Testimony on Competitive Issues in the Cable Television Industry," Subcommittee on Antitrust, Monopolies and Business Rights, Judiciary Committee, U.S. Senate, April 12, 1989.

TABLE 1:

ESTIMATES OF REPRODUCTION COSTS AND SALES PRICES OF CABLE SYSTEMS

YEAR	REPRODUCTION COST	SALES PRICE	RATIO OF AVERAGE SALES PRICE TO REPRODUCTION COST
1983[1]	$645	$695-1110	1.5
1986[2]	$616-1000	$1650-1732	2.1
1988	$600-1000[3]	$2300-3300[4]	3.5
1989[5]	$500[6]	$2300	4.6

---

[1] Vogel, Harold L., *Entertainment Industry Economics: A Guide for Financial Analysis* (Cambridge: Cambridge University Press, 1986) Chapter 7.

[2] Shooshan and Jackson, Inc., *Measuring Cable Market Power: Recent Developments* (Washington, D.C.: December, 1988).

[3] Low estimate is from note 2; high estimate from Pepper, Robert M., *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies and Institutional Change* (Office of Plans and Policy, Federal Communications Commission: November, 1988).

[4] See note 2.

[5] MacAvoy, Paul W., "Tobin's q and the Cable Industry's Market Power," in *Comments of the United States Telephone Association* (Federal Communications Commission, MM Docket No. 89-600, March 1, 1990). Reproduction cost is the high end. Sales prices are private transactions only.

[6] The declining cost of cable systems per subscriber can be attributed to at least two factors -- a sharp decline in interest rates after 1983 and increases in the penetration rate which spreads fixed costs over a larger base.

and

low elasticities of demand.

All this evidence was presented before we estimated Tobin's q. It is quite clear that the high Tobin's q is entirely consistent with our finding of excessive market power based on the other forms of evidence.

The NCTA paper ignores all the other evidence of the exercise of market power and offers a series of possible alternative explanations for the high Tobin's q. It does not offer one shred of empirical evidence to support any of the alternative explanations of the high Tobin's q.

Not only is there extensive evidence beyond Tobin's q that market power is being exercised, but the calculation of q is not presented in a vacuum. It is the precipitous rise in q after deregulation, a rise that far outstrips market values for other firms in the economy, that catches our attention (see Table 1). It is one thing to say that q is high, but quite another to say that q rose dramatically in a short period of time when prices rose sharply.

The NCTA paper would have us believe that the high q (not the precipitous rise in q) could theoretically be due to one of a number of factors (it does not say which). The major alternatives grouped by their nature are: good will or reputation, expenditures on advertising or research and development, customer base or franchise, specific skills of managers and workers. These theoretical alternatives are unconvincing and provide little comfort for subscribers.

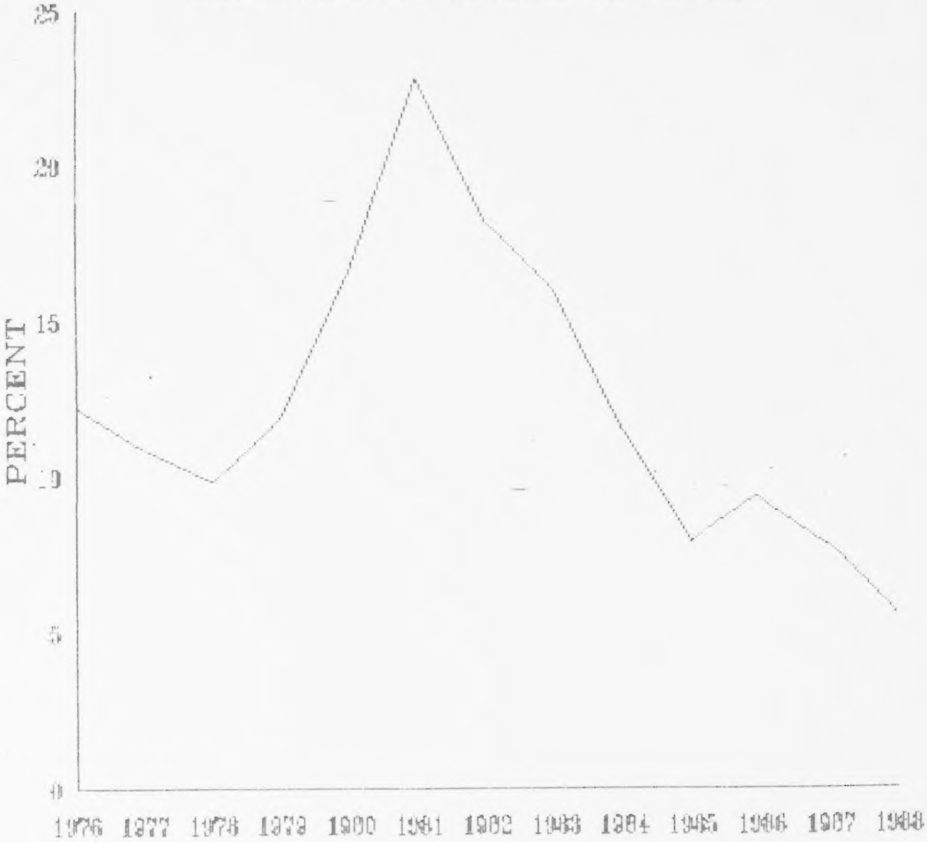
First, if the franchise or customer base is conferring the high value of q, which is being realized in the form of high sales prices that are supported by high rates, we would question the legitimacy of the explanation. This says nothing more than that the franchise is transferring wealth from subscribers to owners.

Second, it is extremely hard to accept the argument that improvements in good will, reputation, advertising or research and development account for the increase in q after deregulation. Cable subscribership was expanding just as quickly before regulation as it did after, without a high q (see figure 1). The only apparent change that could reasonably explain the rise in q is the growth in monopoly power that occurred after price deregulation.

Third, given the severe service problems that the cable industry has suffered, it is highly unlikely that reputation and good will could be shown to be the source of a high q, not to

FIGURE 1:

ANNUAL INCREASE IN BASIC SUBSCRIBERS



SOURCE: Paul Kagan Associates, Annual Yearbook.

mention a rising q. Moreover, it is debatable whether governmentally granted franchises should profit from good will. Electric utilities, telephone companies, etc., are not allowed to include "rate elements" for good will or reputation (although their satisfaction ratings are considerably higher than those of the cable industry).

Finally, the NCTA paper's analysis of why q can be high in competitive industries is both hollow and troubling. It describes a series of barriers to entry or exit, some created by investment, some inherent in the nature of sunk costs, that do not describe competitive industries but denote why industries deviate from the competitive norm. The discussion of riskiness of investment does not typify the cable industry. The granting of the franchise precedes and triggers the investment, so it ensures significantly less risk than one typically finds in other industries.

The NCTA paper's complaint about the imprecision of economy-wide or sector wide estimates of q still does not counter the fact that the cable industry q is much higher than other industries which appear to be structurally more competitive. The cable industry q is now four to five times as high as the national average.3

The idle theoretical speculation about why the cable q might be so high lacks any conviction. There is good empirical evidence on cable market power, and Tobin's q is consistent with that evidence. Cable's alternative explanations are unsubstantiated and provide little solace to subscribers, even if they were correct.

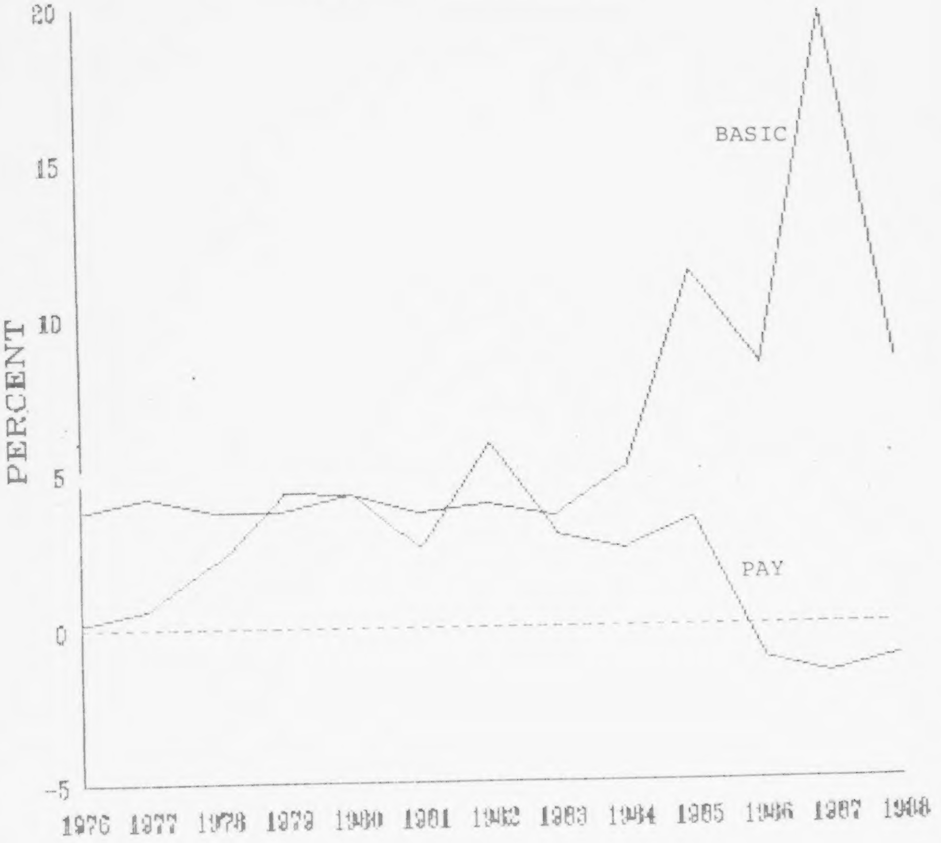
The single best explanation for the extremely high level of q and its rapid rise in recent years is the rapid increase in rates and revenues realized by cable companies since deregulation (see Figure 2). That increase has been transformed into excess profits realized in extremely high prices paid for cable systems.

---

3. MacAvoy, Paul W., "Tobin's q and the Cable Industry's Market Power," in Comments of the United States Telephone Association (Federal Communications Commission, MM Docket No. 89-600, March 1, 1990), Table 15, presents estimates of q based on the market value of debt and equity, which are 3.39 compared to the average for 1200 firms of .89.

FIGURE 2:

ANNUAL PRICE CHANGES



SOURCE: Paul Kagan Associates, Annual Yearbook.

Regency Plaza One
Suite 600
4643 S. Ulster Street
Denver, Colorado 80237

Post Office Box 5630
Denver, Colorado 80217
(303) 721-5500

1990 APR 25 PM 1:46

TCI TELE-COMMUNICATIONS, INC.

Robert Thomson
Vice President
Government Affairs

April 24, 1990

The Honorable Daniel K. Inouye
United States Senate
722 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At your hearing on March 29, 1990 on the staff draft amendment to S. 1880, references were made suggesting that TCI has engaged in inappropriate and anti-competitive behavior in a number of situations. In order to set the record straight on these matters, all of which have been the subject of considerable scrutiny and clarification, including testimony before the Subcommittee, I would appreciate your making this letter a part of the hearing record.

At the hearing, Senator Gore asserted erroneously that TCI has a majority ownership interest in K Prime Partners which is developing an extended programming service (EPS) consisting of seven national superstations and as many as three pay-per-view services to be distributed via direct broadcast Ku-band satellite. Senator Gore also alleged incorrectly that the K Prime Partners have decided to restrict distribution of its EPS to franchised cable operators. It is disturbing that Senator Gore continues to make these incorrect statements in light of the fact that the K Prime Partners have provided Senator Gore with complete information on this subject.

As you are well aware, K Prime Partners is a joint venture between GE American Communications and nine cable operators: ATC, Comcast, Cox, Continental, Newhouse, TCI, United Artists and Warner. TCI has an ownership affiliation with only United Artists. Even attributing United Artists' ownership interest to TCI, TCI would not have anything close to a majority ownership stake in K Prime Partners. Second, the K Prime Partners announced at the outset of the project that it plans to utilize qualified established satellite dealers to assist it in the distribution of programming to the widest market segment possible. K Prime Partners has never indicated that its programming would be made available for distribution solely through cable operators.

Senator Gore also dredged up once again the allegation that TCI led a conspiracy of the cable industry to foreclose competition to CNN by NBC. Both TCI and NBC have categorically denied that TCI in any way coerced NBC into dropping its plans for an all news service. TCI's affiliation agrement with NBC for the payment of subscription fees in connection with carriage of CNBC merely tracks language that exists in virtually every one of TCI's affiliation agreements. The language is designed to assure that TCI continues to receive the service for which it is paying. The allegation that TCI would attempt to foreclose competition is contrary to its efforts to foster additional competition and against TCI's economic interest. As we have explained, it is not in TCI's interest to allow any programming service, whether affiliated or not, to reach a state of dominance where they have the ability to whipsaw TCI and its subscribers into an endless stream of rate increases. Our decision late last year to retier certain programming services with escalating programming costs involved both affiliated and unaffiliated services.

Finally, the city attorney for Jefferson City, Missouri rehashed in considerable detail TCI's provision of cable service in Jefferson City. Unfortunately, the impression he left of the current situation is totally incorrect.

Enclosed is a copy of the cable franchise issued by Jefferson City to TCI. If you turn to Section 8.03, you can see that the franchise contains substantial liquidated damages for violations. Contrary to the impression left at the hearing, Jefferson City has never made any attempt to impose liquidated damages on TCI for franchise violations.

The allegation that there are substantial continuing service problems in Jefferson City is totally incorrect and unsubstantiated. Enclosed for your reference is a letter from the city's Cable Quality Commission, which oversees franchise enforcement, praising TCI for its excellent service in Jefferson City. ("TCI is rapidly becoming one of our communities best business partners.") For over the last year, the city has averaged less than eight complaints a month about TCI's service (less than one tenth of one percent of our over 12,000 subscribers). All have been resolved promptly by TCI without resort to the formal hearing process under the franchise agreement. In recent months, the number one topic of complaints has been the changes brought about by Syndex which resulted in the deletion of certain network affiliates previously carried on the system, a circumstance as you are well aware totally outside the control of TCI.

The city attorney also left the impression that TCI expressed interest in servicing an annexed area of the city only after a third party offered to service the area. This distorts the actual situation. The third party was not willing to service the area under the same provisions as the TCI franchise. We objected strongly to the city not treating TCI even handedly and reiterated TCI's desire to service the area through a separate headend. The area in question is located across the Missouri River from the rest of the City. Because of the few customers that are involved, it is not economically feasible for TCI to serve the area from the Jefferson City headend. Moreover, even though TCI is willing to serve this area through a different headend, it is important to note that the franchise agreement does not require TCI to serve this area.

The notion that Jefferson City is totally without the ability to protect the public interest is completely belied by the enclosed franchise agreement. For example, Section 5.03 obligates TCI to pay $275,000 to support access. We also refer you to Section 7 "Operation and Maintenance."

Finally, in discussing rate increases from $6.50 in 1981 to what he said (incorrectly) was $21.45 per month currently the city attorney failed to note that TCI has increased the number of available basic channels from 11 to 25. Thus, since 1981 the per channel cost of basic has increased less than a dime. Moreover, contrary to the testimony, the basic rate for subscribers who do not need converters beginning in May will be $18.95. Those who need converters will pay $20.95.

With respect to the lawsuit, all of the allegations involve the unauthorized actions nearly a decade ago of a single employee who was terminated by TCI. Subsequently, TCI instituted strict antitrust compliance requirements to ensure full antitrust compliance by all of its employees in Jefferson City.

I trust this information will clarify the record.

Sincerely,

Bob

Robert Thomson
Vice President,
Government Affairs

Montgomery County Government
ROCKVILLE MARYLAND 20850

Sidney Kramer
County Executive
(301) 217-2500
TTY 279-1083

April 10, 1990

Hon. Daniel K. Inouye
Chairman, Senate Communications Subcommittee
Commerce, Science, and Transportation Committee
SH-227
Washington, D.C. 20510

Dear Senator Inouye:

This is to correct, for the record, the information regarding Montgomery County, Maryland contained in the oral testimony of James P. Mooney, President, National Cable Television Association. He testified before the Senate Communications Subcommittee on March 29, 1990 and, either recklessly or deliberately, sought to mislead the Subcommittee when he said:

> We bear unique regulatory burdens and costs under the Cable Act which are not shared by our competitors... in Montgomery County, Maryland, for example, the cable company will, this year, pay to the county government 14% of its gross revenues, in cash, off the top, in franchise fees, access fees and other taxes, none of which would apply to our competitors. And that is before you calculate the costs of the access channels, and the institutional and governmental networks the system is also required to provide as required by the franchise authority.

In Montgomery County, the cable company pays the County a 5% franchise fee and a 1.5% access grant (both of which are separately itemized on subscriber bills). These fees are permitted under the federal Cable Act and they total 6.5%, not 14%.

Mr. Mooney's 14% figure includes a mix of other business expenses which are neither part of the obligations under the federal Cable Act nor related to revenue. The items he includes, which he did not identify for the Subcommittee, are:

1) Payments resulting from a Settlement Agreement entered into by the previous franchisee to end enforcement action on over 20 franchise violations (a liability assumed by the current operator when it acquired the cable system in 1986).

2) Personal property taxes, which are paid by all businesses in the State of Maryland and are not unique to cable television.

To provide more detailed information on rate regulatory issues now under consideration by the Subcommittee, I am appending a copy of of a memorandum prepared by my staff on several other points raised in the cable industry's testimony. I am also enclosing, for the record, a copy of Montgomery County's filings with the FCC on these issues.

I appreciate the opportunity to submit these comments.

Sincerely,

Sidney Kramer
Sidney Kramer
County Executive

National Cable Television Association

1724 Massachusetts Avenue Northwest
Washington D.C. 20036
202 775 3650

1990 APR 16

April 12, 1990

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I understand that Mr. Sidney Kramer, the County Executive of Montgomery County, Maryland, has sent you a letter concerning my recent testimony before the Subcommittee, in which he characterizes me as "either recklessly or deliberately, having sought to mislead the Subcommittee. . . ."

Mr. Kramer refers to my statement that the Montgomery County cable system "will, this year, pay to the county government 14% of its gross revenues, in cash, off the top, in franchise fees, access fees and other taxes, none of which would apply to our competitors."

Having carefully read Mr. Kramer's letter, and the staff memo attached to it, I am not sure what his complaint is. He apparently does not dispute that the cable system will pay the county government 14% of its revenues this year, but concentrates mainly on justifying these payments as arising in part from the County's personal property tax and in part from exactions the County required as a condition of approving a cable license transfer in 1986. My point, of course, was simply that the cable company has to give Mr. Kramer 14% off the top, and a competitor such as Sky Cable (which Mr. Kramer apparently is aware of because it is mentioned in the staff memo attached to his letter) would bear none of these burdens.

Montgomery County is a place where the franchising process got very much out of hand. The county government was so intent on getting a state-of-the-art cable system when it granted a cable franchise in 1983 that what it got was a "beyond the state-of-the-art" system, i.e. the system it had put in proved not to work. This proved somewhat embarrassing to all concerned, including the county government, which had professed considerable expertise in the field. The embarrassment did not preclude the County from demanding a very large cash payment as a condition of allowing its original franchisee to transfer the license to a successor, however, even though it was generally understood that the new cable operator would have to rip out most of the plant installed by its predecessor and amortize the cost of the cash payment to the county, both at the expense of its subscribers. Here, as in other places, the interest of most subscribers in simply getting cable TV seemed to get lost in the welter of demands for economic concessions and exotic "telecommunications services" most people seem indifferent to.

I am attaching a breakdown of monies paid to Montgomery County by the cable operator over a four-year period so that you may judge for yourself the accuracy of my point having to do with the relative regulatory burdens of some of cable's competitors. A direct broadcast satellite system such as Sky Cable would have no more obligation to Montgomery County than a television station licensed to Washington, D.C., or for that matter, one licensed to San Francisco.

With best wishes.

Sincerely,

James P. Mooney

JPM:rrs
Attachment

ANALYSIS OF COUNTY PAYMENTS
1987–1990

	YEAR ENDED			
	1987	1988	1989	1990
GROSS REVENUE	9,920,272	19,785,114	31,172,997	56,540,000
FRANCHISE FEES @ 5%	488,087	875,875	1,558,682	2,827,000
ACCESS PGM FEES @ 1.5%	157,180	262,763	467,604	848,100
SPECIAL ACCESS SUPPORT PMT			1,072,500	1,430,000
SUB TOTAL==================>	645,267	1,138,638	3,098,786	5,105,100
PERSONAL PROPERTY TAX	625,876	1,235,603	1,804,113	2,500,000
TOTAL COUNTY PAYMENTS=============>	1,271,143	2,374,241	4,902,899	7,605,100
% PROPERTY TAX OF GROSS REV	6.31%	6.25%	5.79%	4.42%
TOTAL PAYMENTS AS % OF REV	12.81%	12.00%	15.73%	13.45%
TOTAL COUNTY PAYMENTS/SUB/MONTH	$3.10	$3.87	$5.34	$5.46
INTEREST COST	37,553	149,241	331,624	589,871
TOTAL EXPENSE TO SUBSCRIBERS	1,308,696	2,523,482	5,234,523	8,194,971
TOTAL EXPENSE AS % OF REV	13.19%	12.75%	16.79%	14.49%
TOTAL CTY PMTS/SUB/MO WITH INTEREST===>	$3.19	$4.11	$5.70	$5.89

1990 MAY -7 [illegible] 34

Montgomery County Government
ROCKVILLE MARYLAND 20850

May 3, 1990

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Communications
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

County Executive Sidney Kramer has already responded directly to you in a letter dated April 10, 1990 regarding the misleading oral testimony before your Subcommittee of Mr. James Mooney, President of the National Cable Television Association, concerning the fees that the cable operator pays to Montgomery County, Maryland. Mr. Kramer has now asked me to respond to the additional erroneous statements about Montgomery County's franchising process that are contained in Mr. Mooney's April 12, 1990 letter (copy attached for your reference).

Mr. Mooney again misleads in characterizing cable system payments in Montgomery County as "14% off the top". As explained in Mr. Kramer's letter of April 10, the cable operator pays the County a 5% franchise fee and a 1.5% access grant, totaling 6.5%. Mr. Mooney erroneously includes personal property taxes in his 14% figure. However, personal property taxes bear no relationship to the Cable Act. Personal property taxes are currently levied uniformly on all businesses in Maryland. Further, as Mr. Mooney's own figures show, personal property taxes are not a percentage "off the top", but rather are a decreasing percentage of total gross revenue over time as revenues increase and the capital plant depreciates.

Mr. Mooney continues to obfuscate the truth about the County's legal dispute with its original franchisee, Tribune-United ("Tribune"), and the $10 million in settlement payments that Montgomery County agreed to accept in lieu of $60 million of freely offered franchise obligations. After testifying that payment of this interest-free settlement obligation (which the County has repeatedly subordinated to the operator's first-lien debt) constitutes "other taxes" imposed "off the top", Mr. Mooney now labels the settlement an "exaction the County required as a condition of approving a cable license transfer in 1986."

During the original franchise solicitation process, Tribune offered a package of services significantly more extensive than the County asked for in its Request For Proposals. As any recipient of such an offer would have done, the County accepted the best offer, and a franchise agreement containing the offered terms was then executed. To do otherwise would have been inconsistent with the County's fiduciary responsibilities to its citizens to maximize the potential public benefits of the use of public property for private commercial gain.

Two years after award of the franchise, Tribune breached over 20 provisions of its franchise agreement and defended against the County's enforcement remedies by arguing that Tribune's own voluntary commitments had become unenforceable for reasons of "commercial impracticability" under Section 625 of the federal Cable Act of 1984. Rather than allow Tribune to abandon its franchise obligations, with possibly years of litigation over what Congress meant by "commercial impracticability", the County chose to end its relationship with Tribune by agreeing to a cash settlement so that the system could be transferred to an operator more likely to complete construction of the system.

As a result of Montgomery County's experience with Tribune, the County believes that Section 625 of the Cable Act should be modified to allow cable companies to seek franchise changes only for prospective obligations, not as a post hoc defense for past defaults or to delay or prevent municipalities from enforcing franchise requirements.

Next in Mr. Mooney's April 12 letter, he misplaces blame on the County for the technological problems of Tribune. At the time of the franchise award, Tribune proposed a conventional technology for its system comparable to what was offered by the other applicants. It was approximately a year after the franchise was awarded to Tribune that Tribune substituted the advanced design TRACS technology in place of the conventional service it had originally promised to construct. The County reviewed the new design, but refused to formally approve it due to unanswered questions about reliability and alternate suppliers.

Tribune nevertheless proceeded with the TRACS technology at its own initiative and at its own risk, with results that were not "embarrassing to all, including the county government," as Mr. Mooney alleges. The results were embarrassing only to Tribune and the cable industry: the TRACS technology was plagued with maintenance problems, the sole supplier faced financial difficulties, and no cable operator wishing to acquire the Tribune systems chose to continue to build with it.

Mr. Mooney also asserts that Montgomery County's new cable operator had to "rip out most of the plant installed by its predecessor and amortize the cost of the cash payment to the county, both at the expense of its subscribers." He fails to mention that the settlement terms and the financial liability of replacing the TRACS plant were known to the purchaser prior to acquiring the system. Cable TV Montgomery, an affiliate of Hauser Communications, voluntarily agreed to assume these liabilities from Tribune. This is standard business practice in the case of a firm which acquires the rights and interests of another. It is reasonable to assume that in doing so, Cable TV Montgomery took these obligations into account in its final agreement with Tribune on the purchase price.

Mr. Mooney's suggestion that the cost of the County's settlement agreement and the cost of removing the TRACS system are somehow County-imposed expenses on cable subscribers is preposterous. The reality is that cable operators now have unregulated monopoly power which they can exploit at the expense of subscribers while preserving enormous profit potential in their systems.

The value of the Montgomery County franchise has increased dramatically in the past three years since Tribune was replaced as the franchisee and rates were de-regulated. If the Montgomery County system had sold on December 31, 1989 at $2,500 - $2,700 per subscriber (recent sales have been as high as $3,000 per subscriber), the market value of the system at 100,000 subscribers would have been $250-270 million. With reported liabilities (including long term debt and obligations under capital leases) of $139,855,955 on December 31, 1989, the net value of the franchise would have been $110-130 million. This represents a tripling of the value of the franchise (it was purchased for $40 million on November 14, 1986), and a five-fold increase in equity investment (original equity was $25 million) in only three years. When the system is fully built, in the latter part of 1990, the net value and return on investment will undoubtedly be even higher.

Finally, the County believes it has a good working relationship with its current operator, Cable TV Montgomery, based on straightforward, honest communications and the open exchange of accurate information. We understand that Mr. Mooney is paid by the cable industry to persuade you to preserve the unregulated monopolistic position which cable currently enjoys. But we strenuously object to his misleading testimony and inaccurate anecdotal information, which is apparently designed to undermine the needed Congressional focus on the legitimate and substantial public demand for reform of current cable legislation.

Sincerely,

Kay B. Stevens
Executive Staff Specialist
Cable Office